1983 WL 181839 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 8, 1983

***1 RE: Section 44-17-870, Code of Laws of South Carolina (1976) as amended.**

The Honorable L.L. Henderson
Sheriff
Newberry County
Post Office Box 247
Newberry, South Carolina 29108

Dear Sir:
Attorney General Medlock has referred your letter dated March 31, 1983, to me for reply.

Your question concerns the responsibility for transporting patients of the South Carolina Department of Mental Health, who were absent without proper authorization from a facility to which they had been involuntarily committed. After analyzing the appropriate statutes, and case law from this and other jurisdictions, it is the opinion of this office that, upon request of the Department, any officer of the peace, including a sheriff or his deputy, must take the patient into custody and return him to a facility designated by the Department.

Section 44-17-870, as amended, provides as follows:
If any patient involuntarily committed to a facility under the jurisdiction of the Department of Mental Health is absent without proper authorization any officer of the peace . . . may upon the request of the facility's super-intendent or director or his designee and without the necessity of a warrant or Court Order, take the patient into custody and return him to a facility designated by the Department . . . (Emphasis added)

Interpretation of the statute and the responsibility of a law enforcement officer turns upon the construction of the word ‘may’. Ordinarily ‘may’ signifies permission, and generally means that the action spoken of is optional or discretionary. ‘May’ is an auxiliary verb indicating liberty, permission, or authority. See, 26A Words and Phrases 387; 82 C.J.S. ‘Statutes' § 380.

There are circumstances where the word ‘may’ can be construed to require an action by an individual. In order to construe the word in such a manner, it is necessary to subject it to two tests. The first test is legislative intent. For the word ‘may’ to be interpreted as mandatory, legislative intent is controlling. Robertson v. State, 278 S.W.2d 770 (S.C. 1981).

The predecessor to § 44-17-870, contained in the 1976 Code of Laws, and having last been amended in 1974, provided as follows:
The Department of Mental Health or a judge of probate of the county wherein the patient is present may issue an order for the immediate confinement of any patient who has left a mental health hospital without permission if there is reason to believe that conditions justifying confinement continue to exist. If the Department of Mental Health issues the order, it shall be endorsed by a judge of the probate court of the county in which the patient was confined. The order shall authorize and require any police officer, preferably in civilian clothes, to take the patient into custody and transport him to the facility designated by the Department of Mental Health.

In 1980 the General Assembly substantially rewrote § 44-17-870, as it presently appears in the supplement to Volume 15 of the Code. See, 1980 Act No. 459, § 1. The intent of the General Assembly is contained in the preamble to the amendment, and reads as follows:

***2** An act to amend § 44-17-870, Code of Laws of South Carolina, 1976, as amended, relating to the reconfinement of mental health patients who leave without permission, so as to provide for the return of such patients without a Court Order and to provide that such absences be reported to law enforcement officials. (Emphasis added)

It is apparent from the preamble to the statute that the purpose of the rewriting of the section was to eliminate the requirement of a warrant or court order. In addition, § 44-17-865 was enacted, which requires the Department to immediately notify appropriate state and law enforcement officials when a patient is absent without proper authorization.

Reading these two sections together, and noting the substantial change from the old statute, it is the opinion of this office that there was an intent of the legislature to eliminate the requirement that the Department obtain a court order for a law enforcement officer to take custody of a patient, absent without authorization, and return him to a Department facility. Accordingly, as the statute now reads, it authorizes a peace officer to take into custody a patient and return him to a Department facility without the necessity of a warrant or court order. The only prerequisite is that the law enforcement agency by notified by the Department of Mental Health, and that a request be made of the agency by the facility's superintendent, or director, or his designee.

The second test in interpreting the word ‘may’ as mandatory is an examination of the statute, and its relationship to the public good or the public interest. The word ‘may’ in the statute must be construed to mean ‘shall’ or ‘must’, whenever the rights of the public or third persons depend upon the exercise of the power to perform the duty to which it refers. See, Collins v. State, 213 A.2d 835 (Me. 1965). In Collins, at issue was a statute providing that when a parolee violated a condition of his parole, or violated the law, a member of the Parole Board could authorize a warrant for the parolee's arrest. The statute further provided that a probation-parole officer ‘may arrest the parolee on the warrant and return him to the institution from which he was paroled’. The Court in Collins construed the word ‘may’ in the latter sentence of the statute to be interpreted ‘must’. The Court reasoned that the public had unquestionable interest in the efficient administration of the parole system, and in prompt action upon violation of the law by a parolee:

It is a general principal of a statutory construction that, when the word ‘may’ is used in conferring power upon officer, court or tribunal, and the public or a third person has an interest in the exercise of the power, then the exercise of the power becomes imperative . . .

213 A.2d 835, 838.

It follows that the public in South Carolina has an interest in the secure confinement of persons involuntarily committed to a facility operated by the Department of Mental Health. It would certainly be in the public interest to have such persons, who are absent without proper authorization, taken into custody using the most efficient method possible, and returned to the appropriate facility. By eliminating the court order and warrant provisions of an earlier statute, the intent of the General Assembly in amending § 44-17-870 reflects that public interest.

***3** Therefore, it is the opinion of this office that, in accordance with the terms of § 44-17-870, when a law enforcement officer is requested by a facility's superintendent or director, or his designee, of the Department of Mental Health, he must take into custody a patient absent without proper authorization, and return him to a facility designated by the Department.

If any further information is needed, please do not hesitate to contact this office.

Sincerely yours,

James G. Bogle

Assistant Attorney General

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