

1974 WL 27763 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 17, 1974

***1 TO: Colonel P. F. Thompson**

SUBJECT: (1) Warrantless Arrest for DUI at Scene of Accident by Officer Who Did Not See Offense Committed. (2) Requiring Breath-Alcohol Test When Arresting Officer Did Not See Offense Committed.

Commanding Officer
State Highway Patrol

You have requested the opinion of this Office with reference to the following questions:

I.

**MAY AN OFFICER LAWFULLY ARREST A DEFENDANT FOR DUI AT
THE SCENE OF AN ACCIDENT WITHOUT A WARRANT WHEN THE
OFFENSE WAS NOT COMMITTED IN THE OFFICER'S PRESENCE?**

It was the rule at common law, and is the rule at the present time in South Carolina, that a law enforcement officer may not make a lawful arrest for a misdemeanor without a warrant unless the offense was committed in the officer's presence. [State v. Williams](#), 237 S.C. 252, 256, 116 S.E.2d 358. For practicable purposes, the term 'in his presence' in DUI cases means that the officer must have observed the defendant driving.

It has been argued that when an officer arrives on the scene of an accident and it is obvious to him that the defendant is under the influence and that he was driving one of the motor vehicles involved in the accident, such circumstances constitute commission of the offense of DUI 'in his presence', and the officer may then lawfully place the defendant under arrest for DUI without a warrant. Such is not the law in South Carolina.¹

I realize fully that the law in this area poses certain substantial problems for traffic officers, but such practical considerations cannot be made the basis for a change in construction of the law. Any such change, if it evolves, must come from the General Assembly or the South Carolina Supreme Court.

It is the opinion of this Office that a law enforcement officer may not effect the lawful arrest of a defendant on a DUI charge without an arrest warrant unless the officer has seen the offense being committed.

There are at least two substantive reasons why the law of the State should be observed meticulously by any law enforcement officer when deciding whether or not to place anyone under arrest. First, of course, is the guarantee of both the Constitution of the United States and the Constitution of South Carolina that every person shall be afforded 'due process of law.' Arrest made unlawfully constitutes denial of 'due process of law', and subjects the officer making the arrest to possible suit for false arrest in State court or suit under the Civil Rights Act in Federal Court.

Secondly, while arrests are more or less routine matters for traffic officers, to the average citizen the experience is quite serious. Certainly, no person should be subjected to such an experience unlawfully for the sake of expediency. If the right to arrest for DUI at the accident scene, based solely upon probable cause, is essential to effective law enforcement,

permission should be requested from the General Assembly to proceed lawfully in such manner. We are a nation of laws - - - not of administrative rule-of-thumb.

*2 This is not to say that there are no circumstances in which a DUI defendant may be arrested without a warrant by an officer who arrives upon an accident scene involving a drunk driver. If, for example, the defendant is grossly intoxicated, he is probably in violation of the public disorderly conduct statute, viz. Section 16-558, 1962 Code of Laws of South Carolina, as amended, and may be arrested by the officer for that offense committed in his presence. If the DUI defendant is still behind the wheel and obviously in control of his vehicle when the officer arrives upon the scene, he is committing the offense of DUI in the officer's presence, and may be arrested without a warrant.

The officer may ask a defendant to accompany him voluntarily to the station-house to make a report of the accident - - - if he informs the defendant that he is not under arrest and is not required to go with the officer.

All that this opinion is designed to say with reference to arrest for DUI at an accident scene, and nothing more should be inferred from it, is that an officer is not empowered to arrest a DUI suspect without an arrest warrant unless the suspect has committed some offense in the officer's presence. There is no authoritative support for the proposition that an officer may make such an arrest based upon evidence gathered at the scene constituting probable cause that the suspect is guilty of DUI. Probable cause of guilt is sound justification for arrest of a felony suspect without a warrant, or for the issuance of an arrest warrant or uniform traffic ticket charging commission of a misdemeanor, but probable cause per se is not justification for an arrest for misdemeanor without a warrant.

The state of the law in this area becomes somewhat more understandable when it is applied to a situation involving some other offense than DUI. For example, a traffic officer investigating an accident is told by one driver that the driver of the other car was speeding, and that such unlawful speed caused the accident. Possibly, skid marks and statements by other witnesses support the allegation. The officer is thoroughly justified in preferring a traffic charge based upon such information, but few would argue seriously that the officer would be justified in arresting the suspect at that point without a warrant. The same reasoning applies in the case of a DUI suspect who is too much under the influence to drive, but who is not grossly intoxicated.

As information, the illegal arrest of a DUI defendant does not entitle the defendant to a dismissal of the DUI charge. [State v. Swilling](#), 246 S.C. 144, 142 S.E.2d 864. This is said not to encourage illegal arrests, but to refute the argument made frequently by defendants that an unlawful arrest necessitates dismissal of the charge. The State Supreme Court has said that such is not the law. involved, has been modified by the circuit judge who issued the order to eliminate such ruling. (Revision dated May 17, 1974).

II.

MAY A DUI SUSPECT BE REQUIRED UNDER THE IMPLIED CONSENT LAW TO SUBMIT TO A BREATH-ALCOHOL TEST OR HAVE HIS LICENSE SUSPENDED WHEN THE OFFICER WHO ARRESTED THE SUSPECT DID NOT SEE THE OFFENSE COMMITTED?

*3 Speaking of the administration of the breath-alcohol test under provisions of the Implied Consent Law, Section 46-344, 1962 Code of Laws of South Carolina, as amended, reads in part:

The test shall be administered at the direction of a law-enforcement officer who has apprehended a person while driving a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor. (Emphasis added.)

The right and duty of the State to suspend the license of a DUI defendant for refusal to take the breath-alcohol test is derived solely from provisions of the Implied Consent Law. Without such Law no such right or duty would exist.

Being a penalty provision, it must be construed strictly against the State even where a degree of ambiguity exists. I see no ambiguity in the Act.

In view of the foregoing, it is the opinion of this Office that a DUI suspect may not be subjected to driver license suspension for refusal to submit to a breath-alcohol test unless the demand for submission to such test is made by an arresting officer in whose presence the offense was committed.²

This means that an officer who is investigating an accident, but who did not see the suspect driving or under the steering wheel obviously in control of his motor vehicle, may not require a breath-alcohol test administered under the Implied Consent Law, i.e. where refusal results in license suspension. The issuance of an arrest warrant for the DUI suspect does not change the situation, because the Implied Consent Law imposes two conditions prerequisite to the breath-alcohol test under Section 46-344:

1. The defendant must be under lawful arrest charged with DUI.
2. The test must be given at the direction of an officer in whose presence the offense was committed and who arrested the defendant.

A DUI suspect who was not arrested by an officer for an offense committed in his presence may submit to the breath-alcohol test voluntarily. If he does so, test results may be used in evidence at trial.

Joseph C. Coleman
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Footnotes

- 1 The order of a circuit judge in Evans v. South Carolina State Highway Department, Darlington County Court of General Sessions, May, 1974, holding that a DUI offense was committed 'in the officer's presence' when it was apparent to the officer upon his arrival on the accident scene that the defendant had been operating one of the motor vehicles
- 2 An opinion of this Office issued in 1970 by Assistant Attorney General Gottlieb, which can be construed as being contra to this opinion, has been reviewed and is hereby withdrawn as the official opinion of this Office insofar as it conflicts with this opinion.

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