U.S.P.S. certified letter no. 7022 0410 0002 2445 0111

United States District Court
Middle Tennessee district

David Jonathan Tulis	)	
Plaintiff	)	
	)	Case No. 3:22-cv-00911
V.	)	Hon. Chief Judge Waverly Crenshaw
	)	Magistrate Judge Barbara Holmes
William Orange	)	
City of Franklin	)	
Roger A. Page	)	
John R. Crawford	)	
Atrium Hospitality	)	
Respondents/	)	
Defendants	)	

Brief in support of petition for injunction

Plaintiff in this action wishes to explain T.C.A. § 40-7-103, arrest by officer without warrant, because law enforcement, attorneys and courts routinely ignore the law, to the harm of the citizenry and the interest of justice.

The city of Franklin's codification of current practice among law enforcement agencies statewide is not surprising. City code sec. 6-109 orders officers to make misdemeanor arrests without a warrant if the offense occurs in the officer's presence. Officer presence is the only test, even though the law itself requires two tests before the officer can make a misdemeanor arrest without judicial sanction.

As a matter of law, two tests are required before an arrest without a warrant for an offense not explicitly mentioned in any of the 11 grounds at § 40-7-103. These unenumerated offenses fall out under the heading "public offense." The officer's presence is test No. 1. The second test is

that of public offense OR threatened breach of the peace. To honor one test and ignore the other is a due process violation against federal- and state-protected rights.

➤ Public offense is a crime *whose nature or form is visible*. A public offense is one *in the nature of a breach of the peace*. Statute says "public offense" or "threat of breach of peace." A public offense is an *existing* breach of peace, which excludes many crimes.

➤ Rules of statutory construction forbid any reading or use of a law that deletes, negates or renders useless any of its provisions, which instant prosecution exemplifies, violating the state's peace and tranquility.

The statute § 40-7-103 begins this way:

> (a) An officer may, without a warrant, arrest a person:
>
> (1) For a **public offense** committed or a **breach of the peace threatened** in the officer's presence *** (emphasis added)

Generally, a public offense is a crime that contains the elements of visibility, disturbance of the peace, uproar, threat, intimidation, spectacle, disturbance. It is akin to disorderly conduct.

Its visibility as an offense means it is the kind of crime for which one might be arrested by a fellow citizen. The common law citizen arrest power is codified at Tenn. Code Ann. § 40-7-109, arrest by private person, grounds. Among those grounds: "Public offense committed in the arresting person's presence."

The limitation on citizen arrest power under public offense doctrine is seen in State of Tennessee v. Ronald W. Byrd, 2001 Tenn. Crim. App. LEXIS 543 *; 2001 WL 840290. It focuses on an erstwhile citizen's arrest and the limits on that power. The court upheld Mr. Byrd's conviction for attempt to commit aggravated kidnapping, aggravated criminal trespass, and resisting arrest.

The judges say the facts of the case did not warrant an instruction on citizen's arrest, noting that the appellant's argument that "[congressional district director Bill] Snodgrass had committed a

crime because Snodgrass did not examine the fifty-pound box of 'evidence' the appellant brought to Congressman Jenkins' office and, therefore, Snodgrass was involved in a conspiracy against the Appellant." This purported crime laid against Mr. Byrd is not one that meets the "public offense" standard.

A police officer operating outside his city's corporate jurisdiction may arrest an offender for a public offense in light of his personal rights as a citizen to make a citizen's arrest.

"Generally, municipal police authority does not extend into the limits of another municipality. See T.C.A. § 6-54-301. However, a police officer may still effect an arrest outside of his municipal jurisdiction to the same extent that a private citizen is authorized to do so by law. State v. Johnson, 661 S.W.2d 854, 859 (Tenn. 1983)." State of Tennessee v. Steven Troy Wilburn, 2015 Tenn. Crim. App. LEXIS 672 *; 2015 WL 5000627.

OBSERVABILITY OF CRIME A REQUIREMENT

From early times, a crucial element in a citizen's arrest-type offense is its visibility. "Under our statute (Shannon's Code, section 6997) an officer may without a warrant arrest a person for a public offense committed in his presence. That means that the offense, or the facts constituting the offense, **must be revealed in** the presence of the officer. An officer cannot lawfully arrest a person without a warrant and search his person for the purpose of ascertaining whether or not he has violated the law. Even if the person arrested were in fact violating the law, the offense was not in legal contemplation committed in the presence of the officer, and such an arrest is unauthorized, where **the facts constituting the offense are incapable of being observed** or are not observed by the officer" Hughes v. State, 145 Tenn. 544, 1921 (emphasis added).

Public offenses are detectable by a human being's eyeballs, in the physical presence of that human being. "It is the duty of the sheriff and his deputies to keep their eyes open for evidence of public offenses." State ex rel. Thompson v. Reichman, 135 Tenn. 653 *; 188 S.W. 225 **; 1916 Tenn. LEXIS 46 ***; 8 Thompson 653

The court in State v. Ash put it this way: "That means that the offense, or the **facts constituting the offense,** must be **revealed** in the presence of the officer. An officer cannot lawfully arrest a person without a warrant and search his person for the purpose of ascertaining whether or not he has violated the law. Even if the person arrested were in fact violating the law, the offense **was not in legal contemplation committed in the presence of the officer**, and such an arrest is unauthorized, where the **facts constituting the offense are incapable of being observed** or are not observed by the officer." Word of a crime reported to an officer by a citizen is not "in the officer's presence" because he didn't see it. State v. Ash, 12 S.W.3d 800 *; 1999 Tenn. Crim. App. LEXIS 764 ** (emphasis added).

'PUBLIC OFFENSE' AKIN TO 'BREACH OF THE PEACE'

The visibility and observability of a public offense allows a citizen's arrest — and also arrest by an officer without a warrant. That's because in the crime's visibility is the element of notoriousness or breach of the peace.

"'A breach of the peace is "a violation of public order, the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace."' Galvin v. State, 6 Cold. 294. The sale of intoxicating liquors has always been recognized as tending to provoke disturbances of good order and breaches of the peace. When such sales were lawful it was found necessary to impose upon them strict regulations to prevent breaches of the peace. Speaking of such a regulation this court long ago said: 'This is a police regulation, for the good order and quiet of the city.' Smith v. Knoxville, 3 Head. 247." State ex rel. Thompson, id.

The State ex rel. Thompson court goes for social color to a list of public offenses. "The term, 'breach of the peace' is generic, and includes riotous and unlawful assemblies, riots, forcible entry and detainer, the sending of challenges and provoking to fight, going around in public, without lawful occasion, in such manner as to alarm the public, the wanton discharge of firearms in the public streets, engaging in an affray or assault, using profane, indecent, and abusive language by one toward another, on a street and in the presence of others, or being intoxicated and yelling on the public streets in such manner as to disturb the good order and tranquility of the

neighborhood." 8 Ruling Case Law, p. 285. From State ex rel Thompson 135 Tenn. 653, *669; 188 S.W. 225, **229; 1916 Tenn. LEXIS 46, ***17

Breaches of the peace are grounds for arrest by officer under Tenn. Code Ann. § 39-17-305, disorderly conduct. A person commits this offense in a public place "with intent to cause public annoyance or alarm" who engages in "fighting or in violent or threatening behavior" or creates a "hazardous or physically offensive condition" or "makes unreasonable noise that prevents others from carrying on lawful activities."

Similar offenses are 39-17-307, obstructing highway or other passageway, in which the accused causes a sensation; he "render[s] impassable or *** render[s] passage unreasonably inconvenient or potentially injurious to persons or property" by obstructing the way. The harassment charge at 39-17-208 tells of "threat of harm to the victim" and riot is put into the same category. Riot involves three or more people in "tumultuous and violent conduct, creates grave danger of substantial damage to property or serious bodily injury to persons" (Tenn. Code Ann. § 39-17-301).

These statutory offenses are breaches of the peace.

Authorities hold that "[a]lthough a breach of the peace frequently causes intimidation or fear, and in some instances intimidation and fear are essential elements, as where the offense is charged to have been committed by threatening and quarreling, conduct need not in all cases be such as is calculated to put one in fear of bodily harm, or to have had that effect, to constitute a breach of the peace. Similarly, although a breach of the peace may be committed by an act of violence, or by one likely to produce violence, or inciting to violence, violence or incitement to violence is not an essential element of breach of the peace in all instances" [notes omitted]. 12 Am Jur 2d Breach of Peace and Disorderly Conduct § 8.

"A statute which prohibits any person from maliciously and willfully disturbing the peace or quiet of any neighborhood, family or person by loud or unusual noise, or by tumultuous or offensive conduct, is not overbroad where the statute seeks to regulate conduct, not pure speech,

and is neutral with respect to the content of any expressive element of such conduct that may exist in a particular circumstance." 12 Am Jur 2d Breach of Peace and Disorderly Conduct § 14. Citation to State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

In *Bouvier's Dictionary*: "A breach of the peace is 'a violation of public order, the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace,'" cited in James Galvin vs. The State, 46 Tenn. 283 *; 1869 Tenn. LEXIS 56 **; 6 Cold. 283.

AFFECTING, DISTURBING THE PUBLIC

A public offense is one that offends the public. As officers stood in the public road opposite a home they heard "loud drunken talk and cursing come from defendant's house." The fact of Cartwright being drunk in his home did not warrant the invasion of that home, since it was not public drunkenness.

"But in addition there was the 'loud drunken talk and cursing,' and that conduct had annoyed the neighbors as evidenced by the fact that it was twice reported to these officers. This profanity **was a public nuisance since** it could be heard at places where the public were. It was, therefore, in public and in hearing of citizens. Compare Young v. State, 78 Tenn. 165. This **drunken cursing was disturbing the peace and quiet of this community** to the extent that they called upon the officers for relief. 'Generally, any practices tending to disturb the peace and quiet of communities, or corrupt the morals of the people, are indictable as public offenses by the common law.'" Parker v. State, 84 Tenn. 476, 478, 1 S. W. 202, 203. Cartwright v. State, 190 Tenn. 543 *; 230 S.W.2d 995 **; 1950 Tenn. LEXIS 520 *** (emphasis added)

GROUNDS FOR ARREST BY OFFICER WITHOUT WARRANT

The constitution forbids searches and seizures generally, but allows them under probable cause or warrant. The general assembly codifies general exceptions to the ban on arrest by officer without warrant at Tenn. Code Ann. § 40-7-103. The law gives 11 grounds for such extra-judicial arrests.

The number of offenses subject to arrest by cop without warrant are greater than 11, because the law allows arrest for felonies, unenumerated, and "public offenses," also unenumerated.

The warrantless arrest grounds include attempted suicide (a)(5), domestic abuse (a)(7) and stalking (a)(9).

More exceptions to the general ban on warrantless arrest relate to **traffic accidents**. Briefly:

> ➤ At the scene of a traffic accident, the officer suspects drunkenness of a driver subject to Title 55, chapters 8 and 10 (DUI). 40-7-103(a)(6)
> ➤ At the scene of a highway crash, up to four hours later, of a "driver who has been transported to medical facility" under suspicion of DUI. 40-7-103(a)(8)
> ➤ At traffic accident, the officer may arrest the "driver of a motor vehicle" up to four hours after "leav[ing] the scene of the accident." 40-7-103(a)(10)
> ➤ An accident involves "serious bodily injury" or "death" and the "driver *** does not have a valid driver license" and "does not have evidence of financial responsibility." 40-7-103(a)(11)

A traffic accident under these conditions involving drunkenness is a public offense, a breach of the peace and a public disturbance fitting for arrest by officer without a warrant. State v. Duer, 616 S.W.2d 614 *; 1981 Tenn. Crim. App. LEXIS 336 **

THREAT OF BREACH OF PEACE

The law at issue gives the officer grounds for arrest for breaches of the peace — but also threats of breaches of the peace. The officer may arrest in anticipation of riot or breach of peace if the totality of circumstances seem to warrant.

The Thompson court indicates that an officer doesn't have authority to make an arrest for a misdemeanor if it doesn't occur in his presence or is not a breach of the peace. "We hold

therefore, that a person found in control of such a place as we have described ***is subject to arrest, without warrant, as for a breach of the peace threatened*** in the presence of an officer. It may be true that he has not committed any offense for which he may be indicted and prosecuted. But neither has the man who has threatened an assault and battery, or to send a challenge, but has been arrested before he could put his threat into execution. In such cases the arrest is made not for the purpose of inflicting punishment, but to prevent the necessity for punishment." State ex rel Thompson at 672 (emphasis added).

"To summarize, it is the duty of a sheriff to keep the peace and prevent or suppress crimes and public offences. In order to do this, he is authorized to arrest, without a warrant, persons known to be or suspected of being armed for the purpose of committing a breach of the peace, and such persons may be required to give security to keep the peace. All other breaches of the peace he is simply commanded to suppress. And, to this end, he is authorized, for such a breach of the peace threatened in his presence, to make an arrest without a warrant. He may likewise arrest for any misdemeanor committed in his presence. In the case of all other misdemeanors, he must have a warrant." State ex rel Thompson

'OFFICER'S PRESENCE' INCLUDES TEAM APPROACH

The presence requirement is intended "to protect citizens from harassment and baseless arrests" State v. Ash, 12 S.W.3d 800 *; 1999 Tenn. Crim. App. LEXIS 764 ** But a major liberalization of 40-7-103 affords the state greater leeway in seizing people without a warrant whose offense occurs in the officer's presence.

The Tennessee high court accounts for radios, communications devices and teamwork and cooperation among law enforcement officers to broaden the "officer's presence" standard. facilitates warrantless arrests by officers in the Ash case.

"In light of the increased speed with which offenders may flee from a witnessing officer and modern communications techniques available to the police, an offense may be said to have been committed in the presence of the arresting officer if he is in communication with and is assisting

the witnessing officer. *** Police officers working together on a case may combine their collective perceptions so that if the composite otherwise satisfies the presence requirement that requirement is deemed satisfied although the arresting officer does not himself witness all the elements of the offense."

The court accepts the use of radio to widen the meaning of officer presence (State v. Bryant, 678 S.W.2d 480, Tenn Crim. App. 1984); communication between departments in separate jurisdictions to affect an arrest (State v Maxie Lewis Hunter, 1989 Tenn. Crim. App. LEXIS 713); officer receipt of "information from another law enforcement official who was witness to the misdemeanor" (State v. Teri L. Hopson, 1997 Tenn. Crim App. LEXIS 627)

However, Ash looks at "certain limited circumstances" that loosen the officer presence rule and does not disturb the "public offense" standard.

STATUTORY CONSTRUCTION

Finally, the rules of statutory construction forbid any reading of law that deletes, voids or makes of no effect any of its provisions.

A court cannot be relieved of the essential task of saying what the law means. The court is "guided by the rules of statutory construction found in the case law of this State. We recall at the outset that 'as a general proposition Code provisions in pari materia . . . *must be construed together,* and the construction of one, if doubtful, may be aided by the consideration of the words of and legislative intent indicated by the others.' (Gallagher v. Butler, 214 Tenn. 129, 137, 378 S.W.2d 161, 164 (1964)) (emphasis added). Additionally, this Court has stated that 'the obligation of a court in construing a statute is to ***give effect to the statutory purpose.*** When the proper application of a statute is not entirely clear, the first inquiry is to ascertain the general legislative intent.' State by Lockert v. Knott, 631 S.W.2d 124, 126 (Tenn. 1982) (emphasis added). Moreover, we have consistently held that 'in construing a statute, ***all sections are to be construed together*** in light of the general purpose and plan, evil to be remedied, and object to be attained. . . . .' State v. Netto, 486 S.W.2d 725, 729 (Tenn. 1972). *** While we recognize that an

unambiguous statute does not require resort elsewhere than the face of the statute to ascertain legislative intent, see, e.g., Roddy Manufacturing Co. v. Olsen, 661 S.W.2d 868 (Tenn. 1983), this principle of construction cannot relieve us of the essential task of saying what the law means, particularly in a case of first impression. *** " (John C. Neff, commissioner of commerce and insurance, v. Cherokee Insurance Co., etc., No. 85-26-I, 704 S.W.2d 1; 1986 Tenn. LEXIS 648) (emphasis added).

GET INCH, TAKE MILE

Petitioner, an investigative journalist who covers government and courts, suggests the court consider the law breach in this case as typical operation of police statewide when it comes to illicit general warrants. One area in which he has made extensive coverage is traffic "crime." Offenses such as "driving on revoked" or "driving on suspended" are not among those that allow for warrantless arrest unless, as indicated above, they involve a crash and aggravating factors such as DUI or flight. It should come under judicial notice that police and other Tennessee officers routinely violate T.C.A. § 40-7-103 in making warrantless arrest in these instances when the law forbids it being that easy.

The problem identified in this case could be summarized this way: § 40-7-103 gives officers an inch as against constitutional protections, and they take a mile.

The exceptions to constitutional protection against arrest without judicial approval *BEFOREHAND* have been worn away. By decades of indifference to constitutional rights of the people, by years of usage and abusage, police, lawyers and courts have allowed the exceptions to become the rule. It is the purpose of this lawsuit to reverse this longstanding abuse against the liberties of the people.

Respectfully submitted,

David Jonathan Tulis

David Jonathan Tulis

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2023, a copy of this document is being sent by first-class U.S. mail to each of the parties below at their address with sufficient postage to deliver this document, is sent digitally as attachment in an email.

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