

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

October 24, 2014

Opinion No. 14-93

Arrest Warrants and Criminal Summonses

QUESTIONS

1. Does 2014 Tenn. Pub. Acts, ch. 531 (“Chapter 531”): prevent a security officer from making an arrest pursuant to Tenn. Code Ann. §§ 40-7-109, -110; limit the types of criminal offenses for which a security officer can make an arrest; or change the civil liability risk faced by a security officer making an arrest if a law-enforcement officer refuses to take the person arrested before a magistrate?

2. Does Chapter 531 affect the actions taken by a merchant or merchant’s agent pursuant to Tenn. Code Ann. § 40-7-116 regarding a person suspected of theft?

3. Does Chapter 531 require an affiant who is not a law-enforcement officer but is seeking a warrant of arrest for a misdemeanor offense to demonstrate more than reasonable cause?

4. Does Tenn. Code Ann. § 40-6-217 permit a warrant of arrest to be issued for a felony offense when no affiant is a law-enforcement officer?

5. Is retroactive application of Chapter 531 to arrest warrants and criminal summonses issued prior to July 1, 2014, constitutional and/or enforceable?

OPINIONS

1. No. Chapter 531 has no bearing on the law authorizing private citizens, including security officers, to make warrantless arrests.

2. No. Chapter 531 does not affect actions taken pursuant to Tenn. Code Ann. § 40-7-116.

3. An affiant who is not a law-enforcement officer but is seeking a warrant of arrest for a misdemeanor offense must show probable cause to believe that the defendant has committed the offense and submit sufficient information to show the need for a warrant and to persuade the magistrate that a warrant should issue.

4. Yes. An elected judge serving an eight-year term can issue a felony arrest warrant pursuant to Tenn. Code Ann. § 40-6-217 even if an affiant is not a law-enforcement officer.

5. It is unlikely that Chapter 531 works to invalidate a warrant or summons that was validly issued with probable cause before July 1, 2014, pursuant to the standard that was then in place.

ANALYSIS

Chapter 531 amended Tenn. Code Ann. §§ 40-6-205, -215, relative to warrants of arrest and criminal summonses. In general, Chapter 531 sets forth a set of rebuttable presumptions governing a magistrate's issuance of such process. *See, e.g.*, Tenn. Code Ann. § 40-6-205(b).

If an affiant seeking a warrant of arrest for a felony offense is not a law-enforcement officer, there is a presumption that no process shall issue. *Id.* § 40-6-205(b)(3). But this presumption is overcome “if the magistrate finds an arrest warrant is necessary to prevent immediate danger to a victim of domestic abuse, sexual assault or stalking as defined in § 36-3-601.” *Id.* If an affiant seeking a warrant of arrest for a misdemeanor offense is not a law-enforcement officer, there is a presumption that the magistrate shall issue a criminal summons and not a warrant. *Id.* § 40-6-205(b)(2). But this presumption is overcome if the affiant submits “sufficient information demonstrating the need for a warrant, and the magistrate agrees that an arrest warrant should be issued,” or if the magistrate finds that a warrant is necessary to prevent immediate danger to a victim of domestic abuse, sexual assault, or stalking. *Id.* If an affiant seeking a warrant of arrest is a law-enforcement officer, the magistrate shall issue an arrest warrant unless the officer requests a summons instead. *Id.* § 40-6-205(b)(1). Chapter 531 took effect on July 1, 2014, and provides that it “shall apply to all warrants of arrest and criminal summons issued before or after such date.” Chapter 531, § 3.

1. Pursuant to Tenn. Code Ann. § 40-7-109, private persons may make arrests for public offenses committed in their presence and for felonies in certain circumstances. Security officers have the same power of arrest as that afforded to private citizens. Tenn. Att’y Gen. Op. 03-018 (Feb. 19, 2003). A security officer, as a private person, is obligated by statute to deliver any person he or she arrests to a law-enforcement officer or magistrate. Tenn. Code Ann. § 40-7-113(a); Tenn. Att’y Gen. Op. 07-02 (Jan. 4, 2007). A law-enforcement officer has the option, however, to refuse to take a person arrested by a security officer before a magistrate, and should do so if he or she does not have reasonable cause to believe that the arrested person has committed an offense. Tenn. Att’y Gen. Op. 03-018. Security officers enjoy no special immunity for injuries incident to a private arrest; in general, “the liability of the security guard would be decided under basic tort law.” *Id.* at 5 (so stating of injuries occurred during transport).

Chapter 531 makes no changes to this regime. Modifications to Tenn. Code Ann. §§ 40-6-205, -215 “have no bearing on a citizen’s statutory authority to make a warrantless arrest.” Tenn. Att’y Gen. Op. 04-036, at 1 (Mar. 12, 2004) (so stating of earlier changes to Tenn. Code Ann. § 40-6-215). Accordingly, security officers still may make arrests pursuant to Tenn. Code Ann. § 40-7-109, and for the same offenses. Likewise, Chapter 531 makes no explicit adjustment to the liability faced by a security officer for an arrest made, for example, when no offense has in fact been committed.

2. Tenn. Code Ann. § 40-7-116(a) allows “[a] merchant, a merchant’s employee, or agent or a peace officer who has probable cause to believe that a person has committed or is attempting to commit the offense of theft” to detain the person for various purposes relating to investigation of the suspected theft. Merchants cannot be held criminally or civilly liable for the detention so long as they act reasonably under the circumstances. Tenn. Code Ann. § 40-7-116(c)-(e). As noted above with regard to the more general arrest power under Tenn. Code Ann. § 40-7-109, Chapter 531 concerns magistrates’ issuance of criminal process, not the authority of private citizens to make warrantless arrests. Merchants’ ability to detain suspected thieves is unaffected.

3. Tenn. Code Ann. § 40-6-205(a) empowers a magistrate to issue an arrest warrant if “there is probable cause to believe the offense complained of has been committed and . . . there is probable cause to believe the defendant has committed it.” In misdemeanor cases, Chapter 531 now requires a private affiant who wants a warrant to “submit sufficient information demonstrating the need for a warrant”; it also requires that “the magistrate agree[] that an arrest warrant should be issued instead of a summons.” Tenn. Code Ann. §§ 40-6-205(b)(2)(A), -215(a)(2)(A). The new language does not override the old. Private affiants still must show probable cause to believe that the defendant has committed a misdemeanor. In addition to (rather than in lieu of) that requirement, private affiants must submit sufficient evidence to show need and ultimately to persuade the magistrate that a warrant should be issued rather than an order to appear.

4. Tenn. Code Ann. § 40-6-217 provides:

Notwithstanding any other provision of this part or § 40-5-102, to the contrary, a judge who is licensed to practice law in this state and elected for an eight-year term of office may, upon a finding of probable cause, issue an arrest warrant in lieu of a criminal summons under any circumstances and regardless of whether any of the exceptions set out in §§ 40-6-205 and 40-6-215 are applicable.

Chapter 531 amends §§ 40-6-205 and 40-6-215. Because the exceptions cannot control the rule, Tenn. Code Ann. § 40-6-217 governs here. *See, e.g., Keough v. State,*

356 S.W.3d 366, 371 (Tenn. 2011) (“Under the generally accepted rules of statutory construction, a special statute, or a special provision of a particular statute, will prevail over a general provision in another statute or a general provision in the same statute.”). Elected judges serving eight-year terms may issue an arrest warrant even if the information upon which probable cause is founded comes from private affiants.

5. As discussed above, Chapter 531 prescribes a set of presumptions that govern whether and under what circumstances privately initiated criminal process may issue. But Chapter 531 expressly applies both prospectively and retrospectively, i.e., to warrants and summonses issued before or after its effective date of July 1, 2014.

Article I, § 20, of the Tennessee Constitution provides that “no retrospective law . . . shall be made.” This provision does not mean that absolutely no retrospective law shall be made but only that no retrospective law that divests or impairs vested rights shall be made. *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 829 (Tenn. 2010) (citing *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 696 (Tenn. 1974)). The retrospective application of remedial or procedural laws is thus not prohibited, so long as vested rights are not impaired. *Id.* Chapter 531 is procedural in nature, and it cannot be said that one private party has a vested right in the means by which it may secure criminal process against another private party.

Nevertheless, it is unlikely that Chapter 531's new procedure works to invalidate a warrant or summons issued before July 1, 2014. Warrants and summonses are court orders, either commanding a law-enforcement officer to arrest a defendant and bring him to court or directing a defendant to appear before the court at a stated time. Tenn. Code Ann. §§ 40-6-201, -207, -215. A law-enforcement officer is entitled to rely on a warrant, *see, e.g., Cunningham v. Reid*, 337 F. Supp. 2d 1064, 1073 (W.D. Tenn. 2004) (“Defendants [police officers] were entitled to rely on the existence of a facially valid warrant.”), and a defendant is expected to comply with a summons, *see, e.g., State v. Ramos*, No. M2007-01766-CCA-R3-CD, 2009 WL 890877, at *4 (Tenn. Crim. App. Apr. 2, 2009), *perm. app. denied* (Tenn. Aug. 31, 2009) (“In short, a court order, even if erroneous or subject to reversal on appeal, must be followed until it is reversed.”). A defendant who has been arrested or has appeared on a summons may challenge the institution of the prosecution by alleging that the warrant or summons was defective. *See* Tenn. R. Crim. P. 12(b)(2)(A); *see also Jones v. State*, 332 S.W.2d 662, 667 (Tenn. 1960) (“The purpose of a warrant is to give an accused person notice that he is charged with some offense and if the warrant is defective, objection may be raised before the committing magistrate or upon a habeas corpus proceeding before indictment.”). But since Chapter 531 merely provides a new standard for magistrates to apply when deciding whether to issue a warrant or a summons, a court would be unlikely to find a “defect” in a pre-July 1, 2014 warrant or summons that was validly issued with probable cause pursuant to the standard that was then in place. *See* Tenn. R. Crim. P. 4(a)-(c) (setting forth the general

requirements for the issuance of a warrant or summons). *Cf., e.g., State v. Ferrante*, 269 S.W.3d 908, 913-14 (Tenn. 2008) (citing Tenn. R. Crim. P. 3 and 4 and holding that affidavit of complaint was void *ab initio* and ineffective to commence prosecution where it was presented to a magistrate who was not capable of making the probable-cause determination).

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