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AG Opinion No. 12-IIB03

February 23, 2012

The Honorable Norman E. Wood
Sheriff of Kent County
Kent County Administrative Complex
555 Bay Road
Dover, DE 19901

RE: Sheriff Arrest Power

Dear Sheriff Wood:

You have asked whether the Sheriff and his deputies have the legal authority to make arrests. After consideration of the Delaware Constitution, statutes, and case decisions, we conclude that the Sheriff and his deputies do not have authority to arrest.

We will first address the issue concerning the occasional claim that the Sheriff has arrest authority by virtue of his mention in the Constitution as a "conservator of the peace." Afterwards, we will address the question whether the Sheriff has independent, statutory authority to arrest.

The term "conservator of the peace" is first mentioned in Delaware law in Article XII of the Constitution of 1776: "The Members of the Legislature and Privy Councils shall be Justices of the Peace for the whole state during their continuance in trust; and the Justices of the Courts of Common Pleas shall be Conservators of the Peace in their respective counties."

In 1792, the Constitution was amended in Article VII, Section 1 to add other government officials to the list: "The members of the Senate and House of Representatives, the Chancellor, the Judges of the Supreme Court, and the Court of Common Pleas, and the Attorney General, shall by virtue of their offices, be conservators of the peace throughout the state; and the Treasurer, Secretary, Clerks of the Supreme Court, Prothonotaries, Registers, Recorders, Sheriffs, and Coroners shall, by virtue of their offices, be conservators thereof, within the counties respectively in which they reside." Article VII, Section 1 of the Constitution of 1831 is virtually identical.

The most recent iteration of the Delaware Constitution in 1897 provided: "Conservators of the peace. . . The Chancellor, Judges and Attorney General shall be conservators of the peace throughout the State; and the Sheriffs shall be conservators of the peace within the counties respectively in which they reside." The Constitution does not define the powers of a "conservator of the peace," and dictionary definitions offer little guidance. See *Black's Law Dictionary* (rev. 4th ed. 1968) at 378 ("Officers authorized to preserve and maintain the public peace.").

From this bit of history, we can see that the term "conservator of the peace:" (1) has been used repeatedly in the Delaware Constitution; (2) has never been defined; (3) has always referred to an array of public officials; and (4) does not confer any specific powers on those office holders. In the absence of a specific grant of power in the Constitution, we must look to the common law in effect at the time of the constitution to determine the authority of a "conservator of the peace." While the common law powers of the Sheriff have not been addressed by the courts in Delaware,¹ a similar question arose in connection with the powers of the Attorney General. In *Darling Apartment v. Springer*, 22 A.2d 397 (Del. 1941), the Delaware Supreme Court said "when the framers of the Constitution created an office by name only they had reference to that office with those generally recognized legal powers, duties and functions belonging to the office in the jurisdiction in which the Constitution was to operate and at the time of the adoption of the Constitution." *Id.* at 407 (Rodney, J., concurring).

Common law powers were never intended to be immutable, cast in stone forevermore. It has long been recognized that legislatures may, when so moved, amend or even abolish authority of public officials previously recognized under the common law. As the court said further in the *Darling Apartment* case:

The common law powers are, at most, a part of the common law, and can rise no higher than their source. If this were not true then much legislation concerning *Sheriffs*, coroners and other constitutional officers of common law origin, whose duties are not expressly defined, would suffer from the same taint. Thus could be brought into question much legislation enacted through the century and a half of the State's existence, touching care and custody of prisoners and the manner of selecting juries, and countless other modifications of common law duties of an officer, where merely the name of the office was carried into the Constitution. (emphasis added). 22 A.2d at 408.

¹ In *Reed v. Brady*, C.A. No. 2156-S, 2002 WL 1402238 (Del. Ch., June 21, 2002), the Court of Chancery dismissed the Sussex County Sheriff's lawsuit for a declaratory judgment to determine his rights under the Delaware Constitution, statutes, and common law without reaching the merits. As a court of equity, the Court of Chancery was without jurisdiction because the Sheriff had an adequate remedy at law in Superior Court. The Sheriff did not pursue the lawsuit in Superior Court.

Like the Attorney General, the Delaware Constitution only mentions the office of Sheriff without defining his powers. The powers of the Sheriff are those that existed by statute or common law in 1897 except as modified or abrogated by the legislature.²

The nature of the Sheriff's powers at common law has changed throughout history. *See generally, State v. Mitchell* 212 A. 2d 873, 879 (Del. Super. 1965); *Atwater v City of Lago Vista*, 532, U.S. 318, 328-33 (2001). We will forgo an exhaustive historical analysis because the law of arrest is governed by statute in Delaware and the relevant statutes control over common law. *State v. Holland*, 189 A. 2d 79, 82 (Del. Super.), *aff'd*, 194 A. 2d 698 (1963). As explained below, whatever authority the Sheriff ever had to arrest at common law has been abrogated by subsequent legislation.

Chapter 19, Subchapter I of Title 11 of the Delaware Code explains the authority to make arrests. That authority is said to belong to a "peace officer." Section 1901(b) defines a "peace officer" as "any public officer authorized by law to make arrests in a criminal case." This definition of a "peace officer" is the only one to be found in the Delaware Code and, in the context of the issue presented here, is circular: a peace officer is someone authorized to make arrests and he is authorized to make arrests because he is a peace officer.

When a statute is arguably ambiguous in a given application, courts rely upon methods of statutory interpretation to give effect to the intent of the legislature. *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242, 1246 (Del. 1985) (*en banc*). Courts must read statutes, as amended, *in pari materia*, to interpret and give effect to the statutory scheme. *Evans v. State*, 872 A.2d 539, 554 (Del. 2005) (*en banc*). The object of this effort is to construe statutes in a way that promotes the purposes of the General Assembly and harmonizes them with its other enactments. *Levan v. Independence Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007) (*en banc*).

Subsequently enacted legislation is given great weight to determine the correct meaning of a prior ambiguous statute. *See* 2B N. Singer, *Sutherland Statutory Construction* §49:11, at 120-21 (6th ed. 2000) (where the meaning of a former statute is doubtful, "subsequent legislation is strong evidence of what the legislature intended in the first statute").

The General Assembly enacted Chapter 19, Subchapter 1 of Title 11 in 1951.³ The term "peace officer" was contained therein and so far, as we can determine, it has never been judicially interpreted in Delaware.

² *See Att'y Gen. Op.* 95IB27 (Aug. 29, 1995) (the Sheriffs "still maintain the duty to transport prisoners under the common law in that the legislature has not expressly restricted or otherwise modified this duty"). The *Delaware Code* codifies some common law powers of the Sheriff in Chapter 21 of Title 10; including: attendance on courts, summoning jurors and witnesses, and sale of property under execution of process.

³ Chapter 19 codified the Uniform Arrest Act which was drafted in 1941 by the Interstate Commission on Crime. "The act grew out of the inadequacies of the common law to meet the modern needs for questioning and detaining suspects. Such detention has long been a police practice, generally sanctioned by the courts in cases of felony, but perhaps of doubtful validity in many cases of misdemeanor." *Cannon v. State*, 168 A.2d 108, 110 (Del. 1961).

In 1981, the General Assembly enacted Chapter 84 of Title 11 of the Delaware Code, establishing a comprehensive regulatory scheme for the training of "police officers." The legislature determined that to promote public safety, anyone who carries a firearm and enforces the laws of this State should be required to undergo formal training appropriate to those duties. To that end, Chapter 84 creates a Council on Police Training ("COPT") which establishes a core curriculum for training (568 hours) at certified police academies in Delaware, and periodic re-training requirements.⁴ Notably, the General Assembly excluded the Sheriff and his deputies from this comprehensive regulatory scheme. "For purposes of this Chapter this term [police officer] shall not include the following: 1. A Sheriff, regular deputy Sheriff or constable;" 11 *Del. C.* § 8401(5)b.1.

Anyone who does "not meet the requirements of this Chapter and the criteria as established by the Council *shall not have the authority to enforce the laws of the State.*" 11 *Del. C.* § 8410 (emphasis added). So it seems that at least by 1981, the General Assembly intended that only those individuals that had completed certification by the Council on Police Training would be authorized to make arrests pursuant to Chapter 19 of Title 11 (arrests on warrants, arrests on probable cause without warrants for offenses committed outside the officer's presence, detaining and questioning suspects).

In 1985, the General Assembly amended 11 *Del. C.* § 1911 to strike the previous section in its entirety and replace it with a provision on statewide police authority. The statute defines a "police officer" to mean "any police officer holding current certification by the Council on Police Training as provided by Chapter 84," of Title 11 in the Delaware Code. Section 1911 gives a "police officer" who is a member of one of the eleven listed police departments statewide arrest authority.

We believe the amendment of Section 1911 is strong evidence of what the legislature intended authorizing a "peace officer" to make an arrest. Chapters 19 and 84 of Title 11 must be read harmoniously to prevent an unreasonable result. It would be unreasonable to expect "police officers" to undergo mandatory training and certification before they can exercise the power of arrest, but to allow any so-called "peace officer" (which would include not only the Sheriff, but a host of other public officials) to have that same power of arrest without having undergone the same training.

⁴ See Regulations of the Delaware Council on Police Training, Section 16.0 Basic Curriculum (includes, among other required courses, Criminal Code 20 hours; Motor Vehicle Code 20 hours; First Responders 40 hours; Firearms 40 hours; Laws of Arrest, Laws of Evidence, and Search and Seizure 40 hours; Weaponless Defense -- 30 hours; Use of Deadly Force -- 6 hours); Section 11.0 (two days ever year of firearms retraining); Section 14.0 (re-training every three years in cardio-pulmonary resuscitation (CPR) and automatic external defibrillator (AED)).

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Having reached this conclusion, however, we must recognize that we are essentially interpreting the intent of the General Assembly as expressed over the course of 30 or 40 years. We think the wisest course for all concerned is to seek clarification from the General Assembly as to whether it wishes to grant county sheriffs the power to arrest. In the meantime, we adhere to our view that Sheriffs do not have the statutory or common law authority to make arrests.

Very truly yours,



Lawrence W. Lewis
State Solicitor

cc: The Honorable Trinidad Navarro, Sheriff of New Castle County
The Honorable Jeffrey S. Christopher, Sheriff of Sussex County