

OPINION NO. 65-177

Syllabus:

1. A sheriff may be on duty at all times, therefore, entitled to carry a concealed weapon at all times.
2. The township trustees must determine when a

township constable is on duty. If the township trustees determine that the township constable is on duty twenty-four hours a day, he is entitled to carry a concealed weapon at all times. However, an appointed constable must give bond to the state and it must be approved by the clerk of the court of common pleas, unless said constable comes within any of the exclusionary provisions of Section 2923.01, Revised Code, other than the elected constable exclusion.

3. The sheriff "may appoint in writing one or more deputies", and such deputies hold their "appointment only during the pleasure" of the appointing sheriff.

4. The sheriff must determine when his deputy is on duty.

5. There is, in Ohio, the position of "special deputy" and the length of his appointment is to be determined by the appointing sheriff. The rights, powers, and duties of a "special deputy" can be no greater than those of a regular deputy, but the said rights, powers, and duties can be reduced by the appointing sheriff.

6. A plain clothes officer subject to call at all times may only carry a concealed weapon as provided in Section 2923.01, Revised Code, when on duty. The determination of when a plain clothes officer is on duty is to be made by the legislative authority of a political subdivision or a public officer having the power to make such a determination.

7. A village marshal, deputy marshal, police chief, city or village policeman must post bond with the clerk of the court of common pleas unless they are on the police force of a municipal corporation.

8. A sheriff or other police officer may carry a concealed weapon when entering other municipalities, counties, or states when he is on duty and official business for the city, county, or state for whom he is employed, even though he is not in "hot pursuit".

9. A sheriff is not liable for the actions of his deputy under Section 311.05, Revised Code, unless said deputy is on official duty.

10. A private detective is not justified in carrying a concealed weapon within the meaning of Section 2945.76 of the Ohio Revised Code, just by virtue of the nature of his employment. The circumstances must justify the carrying of a concealed weapon, and the fact that a person is legally employed is not justification.

To: Donald D. Simmons, Wood County Pros. Atty., Bowling Green, Ohio
By: William B. Saxbe, Attorney General, September 28, 1965

Your request for my opinion reads as follows:

"A number of questions have arisen recently involving the interpretation of Section 2923.01 of the Ohio Revised Code and related matters. This section provides:

"No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person. This section does not affect the right of sheriffs, regularly elected constables, and special officers as provided by sections 311.07, 737.10, 1717.06, 1721.14, and 2917.32 of the Revised Code, to go armed when on duty. Deputy sheriffs and specially appointed police officers, except as are appointed or called into service under said sections may go armed if they first give bond to this state, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them. Persons injured by such improper use may have recourse on said bond.

"Whoever violates this section shall be fined not more than five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one nor more than three years.'

"I would like your opinion regarding the following matters.

"1. When is a sheriff on duty within the meaning of this statute? If his duty extends to twenty-four hours, is he entitled to carry a concealed weapon at all times?

"2. How does the fact that constables are no longer elected affect their right to carry concealed weapons? If they must post bonds, with whom do they do so? When is a township constable on duty? Is he 'on duty' at all times and therefore entitled to carry a concealed weapon at all times?

"3. What is the correct method and manner of appointing a deputy sheriff?

What is the length of the term of appointment?

"4. When is a regularly appointed deputy sheriff on duty within the meaning of this statute if he serves a regular tour of duty but is subject to call at all times by the sheriff?

"5. Is there, in Ohio, such a position as 'special' deputy sheriff? If a sheriff purports to appoint a 'special' deputy sheriff what is the length of the term of his appointment? What are his rights, powers, and duties, especially with respect to the above-quoted statute?

"6. Do plain clothes officers, such as city detectives, state highway patrolmen, or deputy sheriffs, have the right to carry concealed weapons at all times if they are subject to call and on twenty-four hour notice by their superiors?

"7. Are village marshals, deputy marshals, police chiefs, and city or village policemen required to post a bond in order to carry a concealed weapon when on duty? If so, with whom is such a bond posted?

"8. What authority does a sheriff, deputy sheriff, or other police officer have to carry a concealed weapon when entering other municipalities, counties, or states when not in 'hot pursuit'?

"9. Is a sheriff responsible under Section 311.05 of the Ohio Revised Code for the actions of his deputies or so-called 'special' deputies who carry concealed weapons 'not while on duty'?

"10. Is a private detective or private investigator in such a 'business or calling' that would justify his carrying a concealed weapon within the meaning of Section 2945.76 of the Ohio Revised Code just by virtue of the nature of his employment or occupation -- just because he is a private detective or investigator?"

You first ask, "When is a sheriff on duty within the meaning of Section 2923.01 of the Ohio Revised Code and if this duty extends to twenty-four hours, is the sheriff entitled to carry a concealed weapon at all times?"

Section 311.07, Revised Code, prescribes the duties of the sheriff. However, there is no provision in this section

or in any other section of the code defining when the sheriff is "on duty".

Since the sheriff is an individually elected county officer and because the legislature is silent in regards to when the sheriff is on duty, it is my opinion that a sheriff may be on duty at all times. Since the sheriff can go armed when on duty and can be on duty twenty-four hours a day, he is entitled to carry a concealed weapon at all times.

In question 2, you inquire as to the rights of constables to carry concealed weapons now that they are appointed to office rather than elected. You also ask if they must post bond and if so, with whom. The third part of your question deals with "when a constable is on duty," and if he is on duty at all times, is he entitled to carry a concealed weapon at all times.

When the General Assembly amended Section 509.01, Revised Code, and made the position of constable an appointed position rather than an elected position, they did not amend Section 2923.01, supra, which allowed "regularly elected constables" to carry a concealed weapon when on duty without posting bond. Therefore, it is my opinion, based upon the General Assembly's failure to amend Section 2923.01, supra, that an appointed constable in order to carry a concealed weapon when on duty must give bond to the state and it must be approved by the clerk of the court of common pleas, unless said constable comes within any of the other exclusionary provisions of Section 2923.01, supra. For instance, if the village appointing said constable is a municipal corporation, then said constable would not have to give bond.

Part 2 of question 2 deals with the determination of "when a township constable is on duty".

Section 509.01, Revised Code, provides for the appointment and compensation of constables and reads as follows:

"The board of township trustees may designate any qualified persons as police constables, and may provide such police constables, such automobiles, communication systems, uniforms, and police equipment as such board deems necessary. The board may pay each police constable, from the general funds of the township, such compensation as the board by resolution prescribes for the time actually spent in keeping the peace, protecting property, and performing duties as a police constable. Such police constable shall not be paid fees in addition to the compensation allowed by the board for services rendered as a

police constable. All constable fees provided for by section 509.15 of the Revised Code, where due for services rendered while the police constable performing such services is being compensated as a police constable for his performance, shall be paid into the general fund of the township."

The above statute makes no provision as to "when a constable is on duty" and I can find no other authority which defines "when a constable is on duty". However, since the board of township trustees must determine the time actually spent by a constable in keeping the peace, protecting property and performing duties as a police constable in order to compensate him, said constable is not on duty twenty-four hours a day, unless the township trustees decide otherwise.

Your third question concerns the correct method and manner of appointing a deputy sheriff and the length of the term of said deputy's appointment. The appointment of a deputy sheriff has been specifically provided for by the General Assembly in Section 311.04, Revised Code, and reads as follows:

"The sheriff may appoint, in writing, one or more deputies. Thereupon such writing shall be filed by the sheriff with the clerk of court of common pleas, who shall enter it upon the journal of such court. The clerk's fees for such filing and journal entry shall be paid by the sheriff. Each deputy so appointed shall be a qualified elector of such county, except that in cases of emergency the sheriff may request of the sheriff of another county the aid of qualified deputies serving in such other counties of the state, and if the consent of the sheriff of such other county is received, the deputies while so assigned shall be deemed to be the deputies of the sheriff of the county requesting aid. No judge of a county court or mayor shall be appointed a deputy."

Sections 325.17 and 3.06, Revised Code, provide for the length of appointment and read in pertinent parts as follows:

Section 325.17, supra.

"The officers mentioned in section 325.27 of the Revised Code may appoint and employ the necessary deputies, assis-

tants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employees and discharge them,* * *" (Emphasis added)

Section 3.06, supra.

"(A) A deputy, when duly qualified, may perform any duties of his principal. A deputy or clerk, appointed in pursuance of law, holds the appointment only during the pleasure of the officer appointing him.* * *

Therefore, you are accordingly advised, the sheriff "may appoint in writing one or more deputies", and such deputies hold their "appointment only during the pleasure" of the appointing sheriff.

In question 4 you ask, "When is a regularly appointed deputy on duty within the meaning of 2923.01, supra, if he serves a regular tour of duty but is subject to call at all times by the sheriff?"

Section 3.06, supra, says in part, "A deputy, when duly qualified, may perform any duties of his principal.* * *

In State ex rel., Geyer v. Griffin, 80 Ohio App., 477, the court said at page 458:

"A sheriff is vested with absolute discretion to determine what deputies shall be employed, the length of their employment, and the duties of his office to be performed by them and subject to the statutory restriction as to the aggregate of compensation to be paid for his office, to fix the compensation of such deputies. As the sheriff is vested with this discretion, the common pleas judge was without authority to place any limitation on the duties to be performed by the relator as special deputy sheriff* * *

Therefore, it is up to the sheriff to determine "when his deputy is on duty" and if the sheriff decides that said deputy is on duty twenty-four hours a day or that said deputy could carry a weapon at all times, then his decision would be the controlling determination.

You ask in question 5 if there is in Ohio a position of "special" deputy and if so, what is the length of the term of his appointment and what are his rights, powers, and duties with respect to Section 2923.01, supra.

In paragraph one of the syllabus in State ex rel. Geyer v. Griffin, supra, it is stated:

"1. There is no statutory restriction upon the right of a county sheriff to appoint special and general deputies, except that the appointments must be approved by the common pleas judge of the county of which the sheriff is an officer, and, therefore, the common law prevails authorizing the sheriff to make such appointments."

At page 457 of Geyer v. Griffin, supra, the court said:

"It will be noted that none of the General Code sections above mentioned contains any provisions as to the appointment or employment of 'special deputies' or 'special deputy sheriffs'. Furthermore, there is no statutory definition of 'special deputy' or 'special deputy sheriff'. However, it will be noted that under the common law the sheriff had the right to appoint an undersheriff and as many general or special deputies as the public service may require, and that such deputies act for the sheriff in his name and stead and are the sheriff's agents and as such agents may do any ministerial act that the sheriff may do.

"It will be noted that there is no statutory restriction upon the right of the sheriff to appoint special and general deputies except that such appointments must be approved by the common pleas judge of the county of which the sheriff is an officer. In the absence of such statutory restriction the common law prevails and the sheriff has the authority to appoint both general and special deputies.

"The time and extent of the exercise of the authority of the sheriff by such special deputy is a matter solely for the determination of the sheriff, as the deputy acts as his agent."

In paragraph two of the syllabus in Geyer v. Griffin, supra, the court held:

"2. The appointment of a person as a 'special deputy' by a county sheriff,

followed by the approval thereof by the common pleas judge of the county, the qualifying for such office by the person taking the oath of office and having his appointment, and approval thereon entered upon the journal of the court, and the giving of bonds authorizing the person to go armed and guaranteeing the faithful performance of his duties, respectively, qualify such person for full-time employment as a de jure deputy sheriff of the county."

Therefore, there is, in Ohio, the position of "special deputy" and the length of the term of his appointment is to be determined by the appointing sheriff. A "special deputy" must post bond under Section 2923.01, supra, and the sheriff must determine when said "special deputy" is on duty.

Question 6 of your request concerns the right of a plain clothes officer to carry concealed weapons at all times if they are subject to call and are on twenty-four hour notice by their superiors.

The General Assembly, has failed to define the term "when on duty" as used in Section 2923.01, supra. The problem then, is to determine whether or not a plain clothes officer is on duty, as contemplated by Section 2923.01, supra, if he is subject to call or is on twenty-four hour notice by his superior.

The United States Supreme Court said in paragraph two of the syllabus in Missouri, Kansas, & Texas Railway Company v. United States, 231 U.S., 112:

"2. Employees, though inactive, are none the less on duty within the meaning of the hours of service act of March 4, 1907, penalizing carriers for keeping their employees on duty for more than sixteen consecutive hours, where they are under orders, liable to be called upon at any moment, and not at liberty to go away."

The court in United States v. Denver & R.G.R. Co., 197 F., 629, 631 said:

"The expression 'on duty' as used in the Hours of Service Law, * * *, means 'to be actually engaged in work or to be charged with present responsibility for such should the occasion for it arise.'"

The two Federal cases set forth above must be read in con-

junction with Sections 3 and 7, Article XVIII, Ohio Constitution, which is a grant of power for the exercise of local self-government.

It is stated in paragraph seven of the syllabus in State ex rel., Canada v. Phillips, 168 Ohio St., 191:

"7. Where a municipality establishes and operates a police department it may do so as the exercise of the powers of local self-government conferred upon it by sections 3 and 7 of article XVIII of the Constitution; and if it does, the mere interest or concern of the state, which may justify the state in providing similar police protection, will not justify the state's interference with such exercise by a municipality of its powers of local self-government."

In Section 737.13, Revised Code, the General Assembly provided that "the director of public safety * * * shall make all rules for the regulation and discipline" of the police and fire departments, "except as otherwise provided by law."

In Maryland Casualty Co. v. Fouche, 15 Ohio Law Abs., 713, the court said in the second paragraph of the syllabus: "A police officer is subject to the orders of his superior so far as they are regular and in compliance with law."

In view of the fact that the General Assembly has not defined the term "when on duty" and has not provided for the situation when a plain clothes officer is subject to call, whether a person can carry a concealed weapon becomes a question of fact such as the courts faced in the Missouri, Kansas, & Texas Railway case, supra, and the Denver & R. G. R. Co. case, supra. However, the germane requirement for carrying a concealed weapon is "being on duty" rather than on call. Certainly, a particular public officer or legislative authority could provide that a person would be subject to call to duty but not constantly on duty. Axiomatically the converse could be provided for.

Question 7 of your request which pertains to the posting of bond by village marshals, deputy marshals, police chiefs, and city or village policemen call for consideration of Section 2923.01, supra, which reads in pertinent part as follows:

"* * *This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by sections 311.07* * *to go armed when on duty. Dep-

uty sheriffs and specially appointed police officers, except as are appointed or called into service under said sections may go armed if they first give bond to this state, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars,* * *

(Emphasis added)

There is no other authority which provides for the posting of bond or for the carrying of concealed weapons for the persons set out in question 7 and so, basing my conclusion on Section 2923.01, *supra*, I feel that the persons set forth in your question must post bond with the clerk of the court of common pleas unless they are police officers of a municipal corporation.

Question 8 of your request reads as follows: "What authority does a sheriff, deputy sheriff, or other police officer have to carry a concealed weapon when entering other municipalities, counties, or states when not in 'hot pursuit'?"

It was held in In Re Sulzmann, Sheriff, 125 Ohio St., 594, at page 597:

"The sheriff is the chief law enforcement officer in the county, with jurisdiction co-extensive with the county, including all municipalities and townships.* * *"

Under Section 311.29, Revised Code, the sheriff is given authority to enter into contracts with "any municipal corporation, township, port authority,* * *or other taxing district, or with the board of county commissioners of any contiguous county with the concurrence of the sheriff of such other county,* * *and counties may enter into agreements with the sheriff whereby the sheriff undertakes * * *to perform any police function,* * *in behalf of the contracting subdivision* * *"

Section 737.04, Revised Code, has a similar provision for municipal corporations and reads in part as follows:

"Any municipal corporation may, in order to obtain police protection or to obtain additional police protection, enter into contracts* * * with one or more municipal corporations,* * *for services of police departments or the use of police equipment or for the interchange of such service or equipment within the several territories of the contracting subdivisions* * *"

I can find no authority which would allow a police officer to carry a concealed weapon into another county, municipality, or state if he is not on official business.

In question 9 of your request you ask if a sheriff is responsible under Section 311.05, Revised Code, for the actions of his deputies who carry concealed weapons while not on duty. Section 311.05, supra, reads as follows:

"The sheriff shall be responsible for the neglect of duty or misconduct in office of each of his deputies."

In Opinion No. 1645, Opinions of the Attorney General for 1958, page 40, I stated in paragraph 3 of the syllabus:

"3. Whether the negligence or other misconduct of a deputy sheriff imposes civil liability upon the sheriff depends on whether the deputy's act was committed in his capacity as a public officer, which in turn is a question of fact to be decided by the trier of fact, subject to the rebuttable presumption that he was so acting. New York, Chicago and St. Louis R.R. Co. v. Fleback, 87 Ohio St., 254."

The above conclusion is supported by the holding in Garman v. O'Neil, 31 Ohio Law Abs., 650 which reads as follows:

"A regularly appointed deputy sheriff employed and paid by merchants to perform the duties of a merchant policeman, who on a certain day, dressed in citizen's clothes and bedroom slippers proceeding to an automobile salesroom the management of which had hired him to guard its property, for the express purpose as testified to by him, of trading automobiles, cannot reasonably be concluded to have been acting in pursuance of his official duties as such deputy sheriff so as to make the sheriff and his bondsmen liable under § 2831 GC (now 311.05, Revised Code) for injury to a salesman caused by the deputy's .45 calibre automatic falling from his shoulder holster and discharging a bullet which struck the plaintiff, nor does the fact that he carried a gun by virtue of his commis-

sion in and of itself render the sheriff or his bondsmen liable."

It is therefore my opinion and you are advised that a sheriff is not liable for the actions of a regular or special deputy, unless said deputy is on duty. The determination of whether or not said deputy is on duty is a question of fact.

In question 10 you ask, "Is a private detective in such a business or calling that would justify his carrying a concealed weapon within the meaning of Section 2945.76 of the Ohio Revised Code, just by virtue of the nature of his employment or occupation?"

In State v. Johnson, 64 Ohio Law Abs., 425, the court said at page 429:

"Justification for carrying a concealed weapon, under the statute (supra) requires the defendant to establish, by the greater weight of the evidence:

"1. That the defendant was engaged in a lawful business, calling or employment.

"2. That the circumstances in which he was placed was such as would justify a prudent man to carry a weapon for the defense of his person, property or family.

"These elements are separate and distinct requirements. A defendant charged with carrying a concealed weapon is not entitled to claim justification unless he is engaged in a lawful pursuit. This provision is a restriction as to the class of persons who may claim such defense in a carrying concealed weapon's case.

"The court's charge, as above quoted, requiring the defendant to show that the circumstances which he claimed to justify carrying a concealed weapon must have been associated or connected with his business, goes beyond the requirements of the statute."

The Court said in State of Ohio v. Matson, 90 O.L.R., 198, at page 199:

"* * *Now here the defendant has

to decide, at his peril, whether he is justified in carrying the weapon, because all men engaged in lawful occupations can not carry concealed weapons simply because they are engaged in lawful occupations; and if they decide that they are justified, because of the circumstances in which they are placed, in carrying a concealed weapon, they do so at their own peril."

Section 2945.76, *supra*, therefore, requires that a person be engaged in lawful employment and that the circumstances in which he was placed would have justified a prudent man in carrying such weapon for the defense of the person, property or family. In my opinion a private detective would not be justified in carrying a concealed weapon at all times just because he is a private detective.

In specific answer to your inquiry, it is my opinion, and you are advised:

1. A sheriff may be on duty at all times, therefore, entitled to carry a concealed weapon at all times.
2. The township trustees must determine when a township constable is on duty. If the township trustees determine that the township constable is on duty twenty-four hours a day, he is entitled to carry a concealed weapon at all times. However, an appointed constable must give bond to the state and it must be approved by the clerk of the court of common pleas, unless said constable comes within any of the exclusionary provisions of Section 2923.01, Revised Code, other than the elected constable exclusion.
3. The sheriff "may appoint in writing one or more deputies", and such deputies hold their "appointment only during the pleasure" of the appointing sheriff.
4. The sheriff must determine when his deputy is on duty.
5. There is, in Ohio, the position of "special deputy" and the length of his appointment is to be determined by the appointing sheriff. The rights, powers, and duties of a "special deputy" can be no greater than those of a regular deputy, but the said rights, powers, and duties can be reduced by the appointing sheriff.
6. A plain clothes officer subject to call at all times may only carry a concealed weapon as provided in Section 2923.01, Revised Code, when on duty. The determination of when a plain clothes officer is on duty is to be made by the legislative authority of a political subdivision or a public officer having the power to make such a determination.
7. A village marshal, deputy marshal, police chief,

city or village policeman must post bond with the clerk of the court of common pleas unless they are on the police force of a municipal corporation.

8. A sheriff or other police officer may carry a concealed weapon when entering other municipalities, counties, or states when he is on duty and official business for the city, county, or state for whom he is employed, even though he is not in "hot pursuit".

9. A sheriff is not liable for the actions of his deputy under Section 311.05, Revised Code, unless said deputy is on official duty.

10. A private detective is not justified in carrying a concealed weapon within the meaning of Section 2945.76 of the Ohio Revised Code, just by virtue of the nature of his employment. The circumstances must justify the carrying of a concealed weapon, and the fact that a person is legally employed is not justification.