

OPINION NO. 86-073**Syllabus:**

1. Pursuant to R.C. 2935.03(C), a township constable may, without a warrant and within the limits of the township, arrest a person for the commission of a misdemeanor only if the constable has viewed the commission of the offense.
2. Township constables are not named in R.C. 2935.03(B) and, therefore, do not fall within the exceptions to the view requirement set forth therein.
3. R.C. 2935.04 authorizes any person, including a constable, to make a warrantless arrest when a felony has been committed or there is reasonable ground to believe that a felony has been committed and when the person making the arrest has reasonable cause to believe that the person arrested is guilty of the offense; the person making the arrest need not have viewed the commission of the offense.
4. If a constable has knowledge of a previous conviction which will enhance an offense of domestic violence from a misdemeanor to a felony, and if the provisions of R.C. 2935.04 are satisfied, the constable may arrest the offender under R.C. 2935.04, even though the constable has not viewed the commission of the offense.

To: Gary L. Van Brocklin, Mahoning County Prosecuting Attorney, Youngstown, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 30, 1986

You have requested an opinion concerning the arrest powers of township constables. Specifically, you have asked whether a township constable must view the commission of a misdemeanor or

must view the occurrence of domestic violence in order to make an arrest. I assume that your request relates to arrests made without warrants, and not to instances in which a constable is directed to execute an arrest warrant. See R.C. 509.05 ("constables shall serve and execute all warrants...directed and delivered to them"); R.C. 509.15(A)(1) (setting forth a fee of one dollar for each named defendant for the service and return by a township constable of, inter alia, a warrant to arrest). See generally Ohio R. Crim. P. 2, 4, 4.1, 9; R.C. 2935.26.

General provisions authorizing township constables to apprehend offenders appear in R.C. Chapter 509. See R.C. 509.05 (constables "shall apprehend and bring to justice felons and disturbers of the peace, suppress riots, and keep and preserve the peace within the county"); R.C. 509.10 ("[e]ach constable shall apprehend, on view or warrant, and bring to justice, all felons, disturbers, and violators of the criminal laws of this state, and shall suppress all riots, affrays, and unlawful assemblies which come to his knowledge, and shall generally keep the peace in his township"). The Ohio Rules of Criminal Procedure contain provisions dealing with arrests and the issuance of warrants, summonses, and citations, but do not define when law enforcement officers are empowered to arrest without a warrant. See Ohio R. Crim. P. 2, 4, 4.1, 9.

Statutory provisions governing warrantless arrests appear in R.C. 2935.03,¹ as follows:

(A) A sheriff, deputy sheriff, marshal, deputy marshal, police officer, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, or state university law enforcement officer appointed under section 3345.04 of the Revised Code shall arrest and detain until a warrant can be obtained a person found violating, within the limits of the political subdivision, metropolitan housing authority housing project, college, or university in which the peace officer is appointed, employed, or elected, a law of this state or an ordinance of a municipal corporation.

(B) When there is reasonable ground to believe that an offense of violence, the offense of criminal child enticement as defined in section 2905.05 of the Revised Code, the offense of public indecency as defined in section 2907.09 of the Revised Code, the offense of domestic violence as defined in section 2919.25 of the Revised Code, a theft offense as defined in section 2913.01 of the Revised Code, or a felony drug abuse offense as defined in section 2925.01 of the Revised Code, has been committed within

¹ The version of R.C. 2935.03 quoted herein is an interim version, effective until December 31, 1987. The version which will take effect at that time eliminates references to "metropolitan housing authority housing project" and "member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code." It does not, however, make any changes affecting the authority of township constables. See Am. Sub. S.B. 356, 116th Gen. A. (1986)(eff., in part, Sept. 24, 1986).

the limits of the political subdivision, metropolitan housing authority housing project, college, or university in which the peace officer is appointed, employed, or elected, a sheriff, deputy sheriff, marshal, deputy marshal, police officer, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, or state university law enforcement officer appointed under section 3345.04 of the Revised Code may arrest and detain until a warrant can be obtained any person whom he has reasonable cause to believe is guilty of the violation. For purposes of this division, the execution of a written statement by a person alleging that an alleged offender has committed the offense of domestic violence against the person or against a child of the person, constitutes reasonable ground to believe that the offense was committed and reasonable cause to believe that the person alleged to have committed the offense is guilty of the violation.

(C) A constable, within the limits of the township in which the constable is appointed or elected, shall arrest and detain until a warrant can be obtained a person found by him committing, within the limits of the township, a misdemeanor, either in violation of a law of this state or an ordinance of a village.

(D) If a sheriff, deputy sheriff, marshal, deputy marshal, police officer, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, constable, or state university law enforcement officer appointed under section 3345.04 of the Revised Code is authorized by division (A), (B), or (C) of this section to arrest and detain, within the limits of the political subdivision, metropolitan housing authority housing project, college, or university in which he is appointed, employed, or elected, a person until a warrant can be obtained, the peace officer may, outside the limits of the political subdivision metropolitan housing authority housing project, college, or university in which he is appointed, employed, or elected, pursue, arrest, and detain that person until a warrant can be obtained if all of the following apply:

(1) The pursuit takes place without unreasonable delay after the offense is committed;

(2) The pursuit is initiated within the limits of the political subdivision, metropolitan housing authority housing project, college, or university in which the peace officer is appointed, employed, or elected;

(3) The offense involved is a felony, a misdemeanor of the first degree or a substantially equivalent municipal ordinance, a misdemeanor of the second degree or a substantially equivalent municipal ordinance, or any offense for which points are chargeable pursuant to division (G) of section 4507.021 of the Revised Code.

This section is an interim section effective until December 31, 1987. (Emphasis added.)

R.C. 2935.03(C) states expressly that a constable "shall arrest and detain until a warrant can be obtained a person

found by him committing...a misdemeanor...." This language has been construed as requiring that a constable must view a misdemeanor offense in order to make a warrantless arrest for such offense. See, e.g., State v. Fields, 62 Ohio Misc. 14, 405 N.E.2d 740 (Belmont County Ct. 1979); 1940 Op. Att'y Gen. No. 2735, vol. II, p. 854; 1938 Op. Att'y Gen. No. 1863, vol. I, p. 234. See generally State v. Darrah, 64 Ohio St. 2d 22, 25, 412 N.E.2d 1328, 1330 (1980)("a law enforcement officer may arrest for a misdemeanor pursuant to R.C. 2935.03 only when that officer has observed the commission of the offense" (citations and footnote omitted)); State v. Lewis, 50 Ohio St. 179, 33 N.E. 405 (1893); City of Columbus v. Leneer, 16 Ohio App. 3d 466, 468, 476 N.E.2d 1085, 1088 (Franklin County 1984)("[w]hat is required for a valid warrantless arrest [under R.C. 2935.03(A)] is not that the officer have absolute knowledge that a misdemeanor is being committed in the sense of possessing evidence sufficient to support a conviction after trial, but, rather, that he be in a position to form a reasonable belief that a misdemeanor is being committed, based upon evidence perceived through his own senses").²

R.C. 2935.03(B) specifies instances in which an arrest without a warrant may be made on the basis of reasonable ground to believe that an offense has been committed, rather than on the basis of a view of the commission of the offense by the arresting officer. See generally City of Columbus v. Herrell, 18 Ohio App. 2d 149, 247 N.E.2d 770 (Franklin County 1969). Among those instances is "the offense of domestic violence as defined in section 2919.25 of the Revised Code." It is, however, clear that the provisions of R.C. 2935.03(B) apply only

² Certain cases have set forth the proposition that a valid warrantless arrest for operating a motor vehicle while under the influence of alcohol, see R.C. 4511.19, may be made even though the officer has not viewed the commission of the offense. On this point, City of Xenia v. Manker, 18 Ohio App. 3d 9, 12, 480 N.E.2d 94, 97 (Greene County 1984), states:

In Ohio, by judicial decision, courts have held that under certain circumstances, a warrantless arrest for operating a motor vehicle while under the influence of alcohol may be made even though the officer has not viewed the commission of the offense. See Oregon v. Szakovits (1972), 32 Ohio St. 2d 271 [61 O.O.2d 496]; State v. Risner (1977), 55 Ohio App. 2d 77 [9 O.O.3d 230]; State v. Adkins (July 19, 1977), Hancock County App. No. 5-77-7, unreported. This rule is an exception to the view requirement of R.C. 2935.03.

See State v. Stacy, 9 Ohio App. 3d 55, 57, 458 N.E.2d 403, 405 (Lorain County 1983)("the word 'found' [as used in R.C. 2935.03(A)] means that the officer must actually see the offense being committed or from the surrounding circumstances, including admissions by the defendant, be able to reasonably conclude that an offense has been committed. Oregon v. Szakovits (1972), 32 Ohio St. 2d 271"). See also, e.g., State v. Allen, 2 Ohio App. 3d 441, 442 N.E.2d 784 (Hamilton County 1981); State v. Pender, 66 Ohio Misc. 23, 419 N.E.2d 1141 (Miamisburg Mun. Ct. 1980).

to the peace officers specified therein--namely, "a sheriff, deputy sheriff, marshal, deputy marshal, police officer, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code,³ or state university law enforcement officer appointed under section 3345.04 of the Revised Code." (Footnote added.) Since a constable is not named in R.C. 2935.03(B), a constable is not authorized by that provision to make an arrest for the offense of domestic violence, or any other offense named in R.C. 2935.03(B), on the basis of reasonable ground to believe that an offense has been committed, rather than upon an actual view of the commission of the offense. See State v. Fields, 62 Ohio Misc. at 17, 405 N.E.2d at 742 (finding, under an earlier version of R.C. 2935.03: "the legislative intent is clear that township constables, in the exercise of their arrest powers, do not fall within the exceptions to the view requirement"). See generally 1940 Op. No. 2735; 1938 Op. No. 1863.

I note, however, that R.C. 2935.04 authorizes warrantless arrests for felony offenses, as follows:

When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.

Pursuant to R.C. 2935.04, any person, including a constable, may make an arrest without a warrant when a felony has been committed or there is reasonable ground to believe that a felony has been committed, and when the person making the arrest has reasonable cause to believe that the person arrested is guilty of the offense. See generally 1974 Op. Att'y Gen. No. 74-094 at 2-382 ("an off-duty municipal police officer, like any other person, is authorized to arrest" under R.C. 2935.04). Provided that the requirements set forth in R.C. 2935.04 are satisfied, the person making the arrest need not have viewed the commission of the offense.

While I am aware of no case that has applied this exception to a constable, it appears that, to the extent that such an exception exists, it is applicable to constables, as well as to those peace officers named in R.C. 2935.03(A). Compare R.C. 2935.03(A)(authorizing the warrantless arrest, by any of the peace officers named therein, of "a person found violating" a state law or municipal ordinance) with R.C. 2935.03(C)(authorizing the warrantless arrest, by a constable of "a person found by him committing" a misdemeanor). See generally State v. Scherer, 69 Ohio Misc. 1, 430 N.E.2d 478 (Akron Mun. Ct. 1981)(finding that, in appropriate circumstances, a State Highway Patrolman may make a valid warrantless misdemeanor arrest for driving while under the influence of alcohol even though he has not viewed the commission of the offense; R.C. 5503.01 authorizes the warrantless arrest of a "person who, in the presence of the...patrolman, is engaged in the violation of...laws"). See also State v. Darrah, 64 Ohio St. 2d 22, 412 N.E.2d 1328 (1980)(the issuance of a traffic citation does not constitute an arrest for purposes of R.C. 2935.03, and the officer issuing the citation need not have personally witnessed the traffic violation).

³ See note 1, supra.

Pursuant to R.C. 2919.25(C), the offense of domestic violence is ordinarily a misdemeanor of the first degree. If, however, the offender "has previously been convicted of domestic violence or a violation of section 2903.11 [felonious assault], 2903.12 [aggravated assault], or 2903.13 [assault] of the Revised Code involving a person who was a family or household member at the time of such violation, domestic violence is a felony of the fourth degree." The Ohio Supreme Court has held that "R.C. 2935.04 authorizes the warrantless arrest of a person for a misdemeanor when the arresting officer knows that the person has a previous conviction which will enhance the misdemeanor to a felony." State v. Wac, 68 Ohio St. 2d 84, 428 N.E.2d 428 (1981)(syllabus, paragraph three); cf. State v. Lamb, 34 Ohio Misc. 104, 299 N.E.2d 317 (Kettering Mun. Ct. 1973)(where there is no indication that a guard knew of a prior conviction that would enhance the possession of a hallucinogen from a misdemeanor to a felony, he was not authorized to arrest under R.C. 2935.04). It follows that, if a constable has knowledge of a previous conviction that will enhance an offense of domestic violence from a misdemeanor to a felony, and if the provisions of R.C. 2935.04 are satisfied, the constable may make a warrantless arrest of the offender under R.C. 2935.04. It is not necessary under R.C. 2935.04 for the constable to have viewed the commission of the offense. R.C. 2935.04 is satisfied if the constable has reasonable ground to believe that a felony has been committed and reasonable cause to believe that the person arrested is guilty of the offense.

Based upon the foregoing, it is my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. 2935.03(C), a township constable may, without a warrant and within the limits of the township, arrest a person for the commission of a misdemeanor only if the constable has viewed the commission of the offense.
2. Township constables are not named in R.C. 2935.03(B) and, therefore, do not fall within the exceptions to the view requirement set forth therein.
3. R.C. 2935.04 authorizes any person, including a constable, to make a warrantless arrest when a felony has been committed or there is reasonable ground to believe that a felony has been committed and when the person making the arrest has reasonable cause to believe that the person arrested is guilty of the offense; the person making the arrest need not have viewed the commission of the offense.
4. If a constable has knowledge of a previous conviction which will enhance an offense of domestic violence from a misdemeanor to a felony, and if the provisions of R.C. 2935.04 are satisfied, the constable may arrest the offender under R.C. 2935.04, even though the constable has not viewed the commission of the offense.