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HIGHWAY PATROLMEN ARE NOT AUTHORIZED TO ARREST INTOXICATED NON-DRIVERS OR PEDESTRIANS—
§§5503.01, 5503.02, OPINION 870, OAG 1939.

SYLLABUS:

Under Sections 5503.01 and 5503.02, Revised Code, members of the state highway patrol are not authorized to arrest persons riding in automobiles, but not driving said automobiles, on the charge of intoxication; and are not authorized to arrest persons walking on the highways merely because said persons are allegedly intoxicated. (Opinion No. 870, Opinions of the Attorney General for 1939, page 1172, followed.)

Columbus, Ohio, June 15, 1962

Hon. Robert Webb, Prosecuting Attorney,
Ashtabula County, Jefferson, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The question has arisen in Ashtabula County as to the authority of a State Highway Patrolman to make an arrest on a State Highway, of a person found in an intoxicated condition, either walking on the highway or riding as a passenger in a motor vehicle, on a State Highway.

“I am cognizant of the 1939 Ohio Attorney General’s Opinion, No. 870, in which it is said, ‘The State Highway Patrol has no authority to make arrests under these conditions’. However, Section 5503.02 of the Revised Code, effective in 10/1/53, it is said that the Superintendent or any Patrolman may enforce the criminal laws on all State property or State Institutions, owned

or leased by the State, and the question has arisen whether or not a State Highway, where easements have been obtained by the State of Ohio, could not be covered by the clause 'leased by the State'. This clause was added in 1953 and was not in the law in 1939. So, in summation, my question is whether Attorney General's Opinion No. 1939, No. 870, is consistent with the Statute as amended in 1953."

Regarding the powers of the state highway patrol, the fifth paragraph of Section 5503.01, Revised Code, provides as follows :

"The superintendent and patrolmen shall be vested with the authority of peace officers for the purpose of enforcing the laws of the state which it is the duty of the patrol to enforce, and may arrest, without warrant, any person who, in the presence of the superintendent or any patrolman, is engaged in the violation of any such laws. Such patrolman shall never be used as peace officers in connection with any strike or labor dispute."

Also, Section 5503.02, Revised Code, reads as follows :

"The state highway patrol shall enforce the laws of the state relating to the registration and licensing of motor vehicles ; enforce, on all roads and highways, notwithstanding section 4513.39 of the Revised Code, the laws relating to the operation and use of vehicles on the highways ; enforce and prevent the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and all laws designed for the protection of the highway pavements and structures on such highways ; investigate and report to the public utilities commission violations of its rules and regulations and the laws governing the transportation of persons and property by motor transportation companies and all other motor carriers for hire ; investigate and report violations of all laws relating to the collection of excise taxes on motor vehicle fuels ; and regulate the movement of traffic on the roads and highways of the state, notwithstanding section 4513.39 of the Revised Code.

"The patrol shall, whenever possible, determine the persons causing or responsible for the breaking, damaging, or destruction of any improved surfaced roadway, structure, sign, marker, guard rail, or any other appurtenance constructed or maintained by the department of highways and shall arrest persons responsible therefor and bring them before the proper officials for prosecution. The state highway patrolman shall investigate and report all motor vehicle accidents on all roads and highways outside of municipal corporations. The superintendent of the state highway patrol or any patrolman may arrest without a warrant any person, who is the driver of or a passenger in any vehicle operated or standing

on a state highway, whom he has reasonable cause to believe is guilty of a felony, under the same circumstances and with the same power that any peace officer may make such arrest. The superintendent or any patrolman may enforce the criminal laws on all state properties and state institutions, owned or leased by the state.

“Any person arrested by the superintendent or a patrolman shall be taken before any court or magistrate having jurisdiction of the offense with which such person is charged. Any person arrested or apprehended within the municipal corporation limits shall be brought before the municipal court or other tribunal of the municipal corporation.

“Patrolmen shall have no other right or power of search or seizure except to take from any person, under arrest or about to be arrested, deadly or dangerous weapons in the possession of such person. No state official shall command, order, or direct any patrolmen to perform any duty or service not authorized by law. The powers and duties conferred on the patrol shall be supplementary to and in no way a limitation on the powers and duties of sheriffs or other peace officers of the state.

In interpreting language similar to that of Section 5503.02, *supra*, then found in Section 1181-2 and 1181-3, General Code, one of my predecessors held in Opinion No. 870, Opinions of the Attorney General for 1939, page 1172, as follows :

“1. Members of the State Highway Patrol do not have authority upon apprehending a person driving an automobile while intoxicated, to arrest another occupant or occupants of said automobile who are also intoxicated, merely because such occupant or occupants are intoxicated.

“2. Members of the State Highway Patrol do not have authority to arrest persons who are found in an intoxicated condition walking on the highways, merely because they are intoxicated.”

At page 1174 of Opinion No. 870, *supra*, it is stated :

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“These provisions of the statutes give to the state highway patrolmen authority to make arrests without warrant of any persons whom they find violating the laws of the state relating to the registration of motor vehicles, the operation of vehicles upon the highways, and the laws for the protection of the highways. They are also given authority to make arrests where signs, markers, guard rails or any appurtenance constructed or maintained by the Department of Highways is damaged or destroyed.

“Clearly, being found in a state of intoxication in a moving automobile driven by another person is not a violation of the laws relating to the operation and registration of motor vehicles or of the laws for the protection of the highways or the appurtenances thereto.

“Likewise, persons who are intoxicated and walk along the highways of the state do not violate the laws relating to the registration or operation of motor vehicles and if they do nothing more than walk along the highways, they do not violate the laws relating to the protection of the highways and the appurtenances thereto.

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At the time that said Opinion No. 870 was written, the pertinent law did not contain the provision authorizing the superintendent or any patrolman to enforce the criminal laws on all state properties and state institutions owned or leased by the state. This provision was added to Section 1183-2, General Code, in 1947, 122 Ohio Laws, 531. Said Section 1183-2 was the successor to Section 1181-3, General Code, construed in Opinion No. 870, *supra*, (121 Ohio Laws, 455, 1945); and Section 1183-2, General Code, became Section 5503.02, Revised Code, in the code revision of 1953.

In general, the state has only easements in the lands on which the state highways are located, although the state may have fee simple title to some of those lands (Sections 5501.11 and 5501.111, Revised Code, authorize the director of highways to acquire land in fee simple). But, even if it were assumed that the state highways are “owned or leased by the state,” I am of the opinion that the authority of the state highway patrol as to highways is only that specifically applying to highways under Section 5503.02, *supra*.

Under said Section 5503.02, Revised Code, the state highway patrol has certain authority as to highways. The patrol must enforce the laws relating to the operation and use of vehicles, including commercial vehicles and the laws designed for the protection of pavements and structures on such highways; and is given authority to make arrests where signs, markers, guard rails or any appurtenance constructed or maintained by the department of highways is damaged or destroyed. The language used to grant such authority very clearly limits such authority to highways, and in my opinion is intended to include all of the authority of the patrol as pertaining to highways.

Thus, I construe the provision as to the enforcement of criminal laws on all state properties and state institutions to grant enforcement powers to the patrol *in addition* to the existing powers as to highways, and I do not believe that a state highway comes within the purview of "state properties" as used in Section 5503.02, *supra*, so as to allow the patrol to enforce the criminal laws of the state thereon.

As noted by my predecessor in the 1939 opinion, being found in a state of intoxication in an automobile driven by another person is not a violation of the laws relating to the operation and registration of motor vehicles or the laws for the protection of the highways or the appurtenances thereto, and the same can be said as to the case where a person who is intoxicated walks along a highway. Accordingly, I must conclude that a state highway patrolman is without authority to make arrests in such instances.

In summary, therefore, it is my opinion and you are advised that under Sections 5503.01 and 5503.02, Revised Code, members of the state highway patrol are not authorized to arrest persons riding in automobiles, but not driving said automobiles, on the charge of intoxication; and are not authorized to arrest persons walking on the highways merely because said persons are allegedly intoxicated. (Opinion No. 870, Opinions of the the Attorney General for 1939, page 1172, followed).

Respectfully,
MARK McELROY
Attorney General