

6884

ARREST — PEACE OFFICER — AT TIME ARREST MADE FOR VIOLATION OF MOTOR VEHICLE OR TRAFFIC LAWS, MISDEMEANOR, NOT ON DUTY FOR EXCLUSIVE OR MAIN PURPOSE OF ENFORCING SUCH LAWS — MOTOR VEHICLE AT TIME OF MAKING ARREST NOT MARKED, SECTION 12616-1 G. C. — OFFICER NOT WEARING DISTINCTIVE UNIFORM — SECTION 12616-3 G. C. — SUCH OFFICER MAY TESTIFY IN PROSECUTION OF PERSON ARRESTED.

SYLLABUS:

A peace officer who, at the time of making an arrest for violation of the motor vehicle or traffic laws of the state which violation amounts to a misdemeanor is not on duty for the exclusive or main purpose of enforcing the laws aforesaid, and who at the time of making such arrest is using a motor vehicle not marked in accordance with Section 12616-1, General Code, or is not wearing a distinctive uniform as required by Section 12616-3, General Code, may nevertheless testify in the prosecution of the person arrested.

Columbus, Ohio May 1, 1944

Hon. Lester W. Donaldson, Prosecuting Attorney
Painesville, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"We have a situation existing in this county where a peace officer other than a constable, as defined by Section 13432-1 of the General Code, on his way going to or returning from work occasionally personally observes a violation of some provision of the motor vehicle act or traffic law or ordinances of a municipality, amounting to a misdemeanor only, especially that of careless driving and speeding. At such times the peace officer is not clothed in the regular uniform prescribed by the department by which he is regularly employed nor is he driving a motor vehicle distinctly marked as prescribed by Sections 12616 et seq. * * *

Section 13432-1 of the General Code of Ohio, provides as follows:

'A sheriff, deputy sheriff, marshal, deputy marshal, watchman or police officer, herein designated as "peace officers" shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained;'

and apparently makes it the mandatory duty of any peace officer to make an arrest for a misdemeanor committed in his presence. However, Sections 12616 et seq. provide that where the arrest is for a violation of motor vehicle or traffic laws or ordinances and a misdemeanor, and the officer is on duty exclusively or mainly for the purpose of enforcing the motor vehicle or traffic laws, he shall not be permitted by the court to testify at the time of the hearing unless he is wearing a uniform and operating a motor vehicle distinctly marked.

I will appreciate your opinion as to whether or not a peace officer whose regular duty is not exclusively or mainly the enforcement of the motor vehicle or traffic laws of this state or ordinances of a municipal corporation, and who at the time of making an arrest for a violation of the motor vehicle or traffic laws and which amount to a misdemeanor and which officer at the time of such arrest is neither wearing the prescribed uniform of the department of which he is a member nor driving a motor vehicle distinctly marked, may lawfully make an arrest for a misdemeanor committed in his presence in the violation of the motor vehicle or traffic laws or or-

dinances of a municipality and if such arrest is made, may such peace officer testify at the hearing in such case in view of the provisions of Sections 12616 et seq. of the General Code.”

As you suggest, Section 13432-1, General Code, makes it the duty of every peace officer to make an arrest for a misdemeanor committed in his presence. The power and duty thus conferred on the officer are present whether the officer is on or off duty, and whether he is or is not in uniform.

Sections 12616 to 12616-3, General Code, which became effective August 3, 1939, were plainly designed not to limit in any degree the provision of Section 13432-1 as to the power and duty to make arrests, but only to limit the right of arresting officers to testify under certain circumstances in prosecutions connected with violations of motor vehicle and traffic laws.

Section 12616 provides:

“Any motor vehicle used by a member of the state highway patrol or any other peace officer, while said officer is on duty for the exclusive or main purpose of enforcing the motor vehicle or traffic laws of this state, provided the same be punishable as a misdemeanor, shall be marked in some distinctive manner or color. The superintendent of the state highway patrol shall specify what shall constitute a distinctive marking or color in accordance with this section except that, the sheriff of a county and the police department of a municipality shall determine the marking and color of the motor vehicles for their respective departments.”

Section 12616-1 provides:

“Every officer arresting, or participating or assisting in the arrest of, a person charged with violating any of the provisions of the motor vehicle or traffic laws of this state, provided the same be punishable as a misdemeanor, and such officer being on duty exclusively or for the main purpose of enforcing the provisions of said code, is incompetent to testify as a witness in any prosecution against such person so arrested if such officer at the time of such arrest was using a motor vehicle not marked in accordance with the requirements of this act (G. C. Secs. 12616 to 12616-3).”

Section 12616-2 provides

“Every member of the state highway patrol and every other peace officer, while on duty for the exclusive or main purpose of enforcing the motor vehicle or traffic laws of this state, provided the same be punishable as a misdemeanor, shall wear a distinctive uniform. The superintendent of the state highway patrol shall specify what shall constitute a distinctive uniform in accordance with this section, except that the sheriff of a county and the police department of a municipality shall determine the uniform for their respective departments.”

Section 12616-3 provides:

“Every officer arresting, or participating or assisting in the arrest of, a person charged with violating any of the provisions of the motor vehicle or traffic laws of this state, provided the same be punishable as a misdemeanor, and such officer being on duty exclusively or for the main purpose of enforcing said provisions of the code is incompetent to testify as a witness in any prosecution against such person so arrested if such officer at the time of such arrest was not wearing a distinctive uniform in accordance with the requirements of this act.”

It will be noted that these sections disqualify the officer to testify only where at the time of the arrest he is “on duty exclusively or for the main purpose of enforcing the motor vehicle or traffic laws of the state, provided the same be punishable as a misdemeanor.” Aside from this disqualification he would have the same right to testify as any other witness. The only peace officers whose powers of arrest are limited to matters relating to motor vehicles and traffic are state highway patrolmen organized under Section 1181-2 et seq. General Code. In an opinion which I rendered on July 10, 1939, found in 1939 Opinions of the Attorney General, p. 1172, I stated my conclusion as follows:

“It would therefore seem that the members of the State Highway Patrol do not have the general authority of peace officers to make arrests and it is obvious that the legislature intended to give to the State Highway Patrol authority to make arrests only in cases involving laws relating to the registration and operation of motor vehicles, laws designed for the protection of the highways and structures appurtenant thereto, where the operator or driver of any vehicle wilfully fails or refuses to obey reasonable signals or directions of a highway patrolman, and where any person wilfully resists or opposes a patrolman in the proper discharge of his duties.”

While the legislature may be presumed to have had in mind the

limited power of the state highway patrolmen in the matter of arrest, there is nothing in the language of the sections above quoted which would disqualify them more than any other officer, in the matter of testifying at the hearing of one arrested. The language of Section 12616 is, "A member of the state highway patrol or any other peace officer", and Section 12616-2 uses almost identical words.

Furthermore, the statute excluding any such officer from testifying, says that he must have been "on duty". It appears to me that the legislature in its use of the words "on duty", had reference to the officer's working hours or shift. Section 4374-1, General Code, prescribes eight hours as a "day's work" for policemen, and Section 17-1a, General Code provides how many hours firemen may be kept "on duty" and when they are to be "off duty." Taking Section 12616 et seq. according to their plain wording, it would follow that a highway patrolman or a police officer who is detailed to traffic duty, whose shift ended at 6 P. M., could not testify if he made a traffic arrest at 5:45 P. M. while driving an unmarked car or while not in his uniform, but if he made such arrest at 6:15 P. M. while on his way home, he could testify.

If we should adopt a less literal construction and hold that the statutes under consideration would affect every officer whose *general day by day* duty is exclusively or mainly the direction of traffic or enforcement of motor vehicle laws, it would not alter the conclusion which I must reach in answer to your specific question. With either of these constructions, I am of the opinion that the statutes in question would not apply to an officer of police or other peace officer whose regular duties are *not* exclusively or mainly the enforcement of motor vehicle or traffic laws although that may be one of his regular duties. If such an officer, though in plain clothes, or driving an unmarked vehicle, *whether on or off duty*, makes an arrest, he would have a right to testify at the trial of the offender.

Accordingly, and in specific answer to your question, it is my opinion that a peace officer who, at the time of making an arrest for violation of the motor vehicle or traffic laws of the state, which violation amounts to a misdemeanor, if not on duty for the exclusive or main purpose of enforcing the laws aforesaid, and who at the time of making such arrest is using a motor vehicle not marked in accordance with Section 12616-1,

General Code, or is not wearing a distinctive uniform as required by Section 12616-3, General Code, may nevertheless testify in the prosecution of the person arrested.

Respectfully,

THOMAS J. HERBERT

Attorney General