

OPINION NO. 69-061**Syllabus:**

1. Section 4513.39, Revised Code, does not prohibit a peace officer who is excluded from making arrests under said Section from swearing out an affidavit for the issuance of an arrest warrant for the arrest of persons who have, in the presence of such peace officer, violated any of the sections enumerated in Section 4513.39, Revised Code.

2. A peace officer, other than the state highway patrol and sheriffs or their deputies, can not execute arrest warrants for violations of the sections enumerated in Section 4513.39, Revised Code, when such violations have not occurred within municipal corporations.

To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio
By: Paul W. Brown, Attorney General, June 16, 1969

I am in receipt of your request for my opinion which reads in pertinent part as follows:

"Would peace officers, other than state highway patrol, and sheriffs or their deputies, be prohibited from preparing and filing affidavits for the issuance of arrest warrants for the arrest of persons who have, in the presence of such peace officers, violated any of the sections enumerated in Section 4513.39 of the Ohio Revised Code?"

"Can such a peace officer execute such warrants for arrest whether issued as a result of his affidavit or as a result of an affidavit prepared and filed by another officer?"

Before proceeding to answer your request, I invite your attention to the pertinent Revised Code Sections. Section 4513.39, Revised Code, states as follows:

"The state highway patrol and sheriffs or their deputies shall exercise, to the exclusion of all other peace officers except within municipal corporations, the power to make arrests for violations, on all state highways, of sections 4503.11, 4503.21, 4511.14 to 4511.16, inclusive, 4511.20 to 4511.24, inclusive, 4511.26 to 4511.40, inclusive, 4511.42 to 4511.48, inclusive, 4511.58, 4511.59, 4511.62 to 4511.72, inclusive, 4513.03 to 4513.13, inclusive, 4513.15 to 4513.22, inclusive, 4513.24 to 4513.34, inclusive, 4549.01, 4549.04, and 4549.07 to 4549.12, inclusive, of the Revised Code."

Section 2319.02, Revised Code, defines "affidavit" as "a written declaration under oath, made without notice to the adverse party."

Section 2935.09, Revised Code, reads as follows:

"In all cases not provided by sections 2935.02 to 2935.08, inclusive, of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer, or a private citizen having knowledge of the facts, shall file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney or attorney charged by law with the prosecution of offenses in court or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney." (Emphasis added)

Section 2935.10, Revised Code, reads in pertinent part as follows:

"Upon the filing of an affidavit or complaint as provided by section 2935.09 of the Revised Code, if it charges the commission of a felony, such judge, clerk or magistrate, unless he has reason to believe that it was not filed in good faith, or the claim is not meritorious, shall forthwith issue a warrant for the arrest of the person charged in the affidavit, and directed to a peace officer; otherwise he shall forthwith refer the matter to the prosecuting attorney or other attorney charged by law with prosecution for investigation prior to the issuance of warrant.

"If the offense charged is a misdemeanor or violation of a municipal ordinance, such

judge, clerk, or magistrate may:

"(A) Issue a warrant for the arrest of such person, directed to any officer named in section 2935.03 of the Revised Code but in cases of ordinance violation only to a police officer or marshal or deputy marshal of the municipal corporation;

"(B) Issue summons, to be served by a peace officer, bailiff, or court constable, commanding the person against whom the affidavit or complaint was filed to appear forthwith, or at a fixed time in the future, before such court or magistrate. Such summons shall be served in the same manner as in civil cases."

The first part of your request concerns whether Section 4513.39, Revised Code, prohibits peace officers from preparing and filing affidavits for violations of the sections thereunder enumerated. By the definition of Section 2319.02, Revised Code, and under Section 2935.09, Revised Code, any person, whether he is a peace officer or a private citizen, may swear out an affidavit. Pursuant to Section 2935.10, Revised Code, such affidavit may be the basis of an arrest warrant. Thereby, the statutes make specific provision for a peace officer to swear out an affidavit.

Section 4513.39, Revised Code, contains no restrictive language as to affidavits concerned with violations of the enumerated Sections. Insofar as an affidavit may be sworn for "an offense in this state" and such action is not precluded under Section 4513.39, Revised Code, the answer to your first question is in the negative. Therefore, peace officers may prepare and file affidavits for the issuance of arrest warrants for the arrest of persons who have, in the presence of such peace officers, violated any of the Sections enumerated in Section 4513.39, Revised Code.

In essence, your second question asks whether a peace officer who is excluded from making an arrest under Section 4513.39, Revised Code, may make such an arrest under power of an arrest warrant. A secondary question involved is whether the peace officer's own affidavit may be the basis of the arrest warrant under which he makes the arrest assuming he can execute arrest warrants.

In Opinion No. 50, Opinions of the Attorney General for 1959, at page 27, concerning whether a municipal policeman would be eligible for disability benefits for injuries sustained outside the municipality, one of my predecessors noted:

"Generally, the responsibility of a police department does not extend beyond the corporate limits of the municipality which supports it."

State, ex rel. Speller v. Painesville, 13 O.C.C. (N.S.) 577 (1910), aff'd, 85 Ohio St. 483 (1912) and De Romedis v. Yorkville, 21 O.N.P. (N.S.) 340 (1918), ruled that a municipal police officer is an officer of the state, appointed under authority given by the state.

These two factors of extent of responsibility and source of authority establish that extraterritorial authority must be derived from the state. Section 4513.39, Revised Code, does not grant such statutory authority.

The statute in question expressly excludes peace officers other than the state highway patrol and sheriffs or their deputies from making certain arrests. They are precluded from making arrests for violations enumerated in the Section when the violations occur outside a municipal corporation. Your question would ask if such exclusion could be avoided by the peace officer where he is operating under an arrest warrant. To allow such action would be contra the express legislative intent. The legislative directive is that only the state highway patrol and sheriffs or their deputies may make arrests for violations of the enumerated statutes which occur outside municipal corporations.

This is in holding with Opinion No. 6025, Opinions of the Attorney General for 1955, page 650. The syllabus of that opinion states as follows:

"1. A police constable designated under Section 509.16, Revised Code, does not have authority under Section 4513.39, Revised Code, to make arrests on state highways even though such officer is deputized by the sheriff of the county.

"2. The position of police constable under Section 509.16, Revised Code, and the position of deputy sheriff are incompatible."

The secondary question involved in this final question need not be answered. Although the answer is obvious, the question is not reached because the peace officers in question can not make such arrests even under an arrest warrant.

It is therefore my opinion and you are hereby advised that:

1. Section 4513.39, Revised Code, does not prohibit a peace officer who is excluded from making arrests under said Section from swearing out an affidavit for the issuance of an arrest warrant for the arrest of persons who have, in the presence of such peace officer, violated any of the sections enumerated in Section 4513.39, Revised Code.

2. A peace officer, other than the state highway patrol and sheriffs or their deputies, can not execute arrest warrants for violations of the sections enumerated in Section 4513.39, Revised Code, when such violations have not occurred within municipal corporations.