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PATROLMAN, STATE HIGHWAY — WHERE ACCIDENT NOT WITNESSED BY HIM, AFTER INVESTIGATION MADE, HE MAY SIGN AFFIDAVIT AGAINST OFFENDER IF THERE IS REASONABLE AND PROBABLE CAUSE TO BELIEVE PERSON NAMED IN AFFIDAVIT IS THE OFFENDER — AFFIDAVIT MUST BE SWORN TO POSITIVELY, NEED NOT BE MADE ON PERSONAL KNOWLEDGE — IN ABSENCE OF MALICE, NO LIABILITY IN EVENT PATROLMAN WERE MISTAKEN — CITATION, ISSUED AT SCENE OF ACCIDENT, COMMAND TO APPEAR IN COURT, NOT ARREST OR RESTRAINT OF LIBERTY AND NO CAUSE OF ACTION WOULD ARISE AGAINST OFFICER.

SYLLABUS:

1. *Where a state highway patrolman does not witness an accident but makes an investigation of the offense he may sign an affidavit against the offender if, from an examination of the scene of the accident, statements of witnesses, etc., the officer has reasonable and probable cause to believe that an offense has been committed by the person named in the affidavit. Such affidavit must be sworn to positively but need not be made on personal knowledge.*

2. *In such case, if the patrolman is not actuated by malice and if he has reasonable and probable cause to believe that an offense has been committed by the person named in the affidavit, there would be no liability in the event such patrolman were mistaken.*

3. *The issuance of a citation at the scene of the accident commanding the offender to appear in court does not constitute arrest or restraint of liberty and, therefore, no cause of action would arise against such officer.*

Columbus, Ohio, March 28, 1941.

Colonel Lynn Black, Superintendent, Ohio State Highway Patrol,  
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion as follows:

“In connection with the investigation of traffic accidents by the Highway Patrol there are many occasions when our patrolmen reach the scene after the accidents occur and are not eye witnesses to same.

In some such cases where violations are indicated the injured party is unable because of injury, or in some instances, unwilling to prosecute the violators. We desire your advice generally as to the authority of a patrolman who did not witness an accident to sign an affidavit or complaint against a person who has committed a misdemeanor by violating the motor vehicle law of the state and the possible liability a patrolman incurs in so doing. We would appreciate your specific advice on the following questions, all of which are based on a fact situation in which the patrolman is not an eye witness to the accident and the violation of law is a misdemeanor.

(1) May a patrolman having made an investigation in such a case file an affidavit or complaint against the offender.

(2) Must an affidavit or complaint be sworn to positively in such cases and must the patrolman have personal knowledge of the facts in order to justify his making such an affidavit or complaint.

(3) How much must the patrolman know personally about the accident to justify his signing a complaint or affidavit. In other words, if personal knowledge is required how can he meet this requirement.

(4) Having signed such a complaint or affidavit if the cast against the offender fails, what liability, if any, will the patrolman be subject to by way of a charge of false arrest, false imprisonment, malicious prosecution, or otherwise.

(5) Will any liability be incurred by the patrolman by reason of his issuing a citation or notice at the scene of an accident commanding the offender to appear in court on a certain day and hour. This notice is simply handed to the offender by the patrolman and is issued before the filing of an affidavit or complaint or the issuing of a warrant.”

One of the few cases in Ohio discussing the question as to whether an affidavit must be made on personal knowledge is the case of *State vs. Standard Oil Company*, 51 Bull. 563. The court said at page 569:

“Another objection to this affidavit is, that it is made on belief and not on positive knowledge. The only reported case in this state where this question is raised is *Pope v. Cincinnati*, 2 Circ. Dec. 285 (3 R. 497). The court does not pass on the sufficiency of such an affidavit but states that it may be open to objection. It is doubtful if the court seriously considered the question. In *State v. Hasledahl*, 2 N.D. 521 (52 N.W. Rep. 315; 16 L.R.A. 150, 153) a strong and clear opinion is given showing that if the verification had to be positive it could in few cases be made by the state’s attorney and often no witness could be found who could make a positive verification. Cases are cited from Michigan and Kansas, sustaining this view.

Take for instance a case where only the guilty person had positive knowledge or where circumstances are relied on to convict and the force of the reasoning is readily seen. It seems to me that the sufficiency of such an affidavit, whether positive or on belief, would be for the court issuing the warrant to determine.”

In the case of *Miller vs. The State*, 2 O.L.A. 488, the court ruled as disclosed by the headnote: .

“An affidavit charging a person with the commission of an offense need not be made by one having personal knowledge of the facts.”

At page 489 the court observed that:

“If such were the rule justice would be seriously impeded.”

Applying the above reasoning to the instant situation, it appears that the patrolman is not required to have personal knowledge of the facts. He may sign the affidavit even though he has not witnessed the accident. His action may be based on his examination of the scene of the accident, statements of witnesses, etc.

The foregoing discussion answers your second inquiry. The affidavit must be sworn to positively but the patrolman is not required to have personal knowledge of the facts.

Your third question has also been answered. As noted, personal knowledge is not required, but investigation, statements of witnesses, etc. must present reasonable and probable cause for believing an offense has been committed.

With reference to any possible liability on the part of the patrolman

as the result of signing the affidavit, it is stated in Laning on Arrest and Prosecution, at page 467:

“The law encourages the performance of the duty of informing by insuring to the complainant all due protection in the discharge of such duty. There can be no recovery in an action against a person for informing or complaining of a suspected party, even though the accuser is mistaken as to the guilt of the accused, unless complainant’s proceedings were actuated by malice and were destitute of probable cause.”

As stated, if the patrolman is not actuated by malice and if his investigation reveals reasonable and probable cause for believing an offense has been committed by the person charged in the affidavit, there would be no liability in the event such patrolman were mistaken.

With reference to your fifth inquiry, it is necessary to determine whether the issuance of a citation or notice to appear constitutes “arrest.” In 3 O.J. 128, an “arrest” is defined as “the taking, seizing, or detaining of the person of another, either by touching, putting hands upon, or by an act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest.”

Obviously, the mere issuance of a citation commanding an offender to appear at a specified time does not constitute “taking into custody” nor is such person subject to the actual control and will of the officer. In support of this proposition is the case of *People vs. Yearman*, 246 N.Y.S. 665, wherein it was stated:

“Officer’s statement to defendant violating traffic ordinance, in officer’s presence, that defendant should appear in city court on following morning would not constitute ‘arrest.’”

In view of the above observations, I am of the opinion that the issuance of such a citation would not give rise to a cause of action against the patrolman.

Therefore, in specific answer to your inquiries, I am of the opinion that:

1. Where a state highway patrolman does not witness an accident but makes an investigation of the offense he may sign an affidavit against

the offender if, from an examination of the scene of the accident, statements of witnesses, etc., the officer has reasonable and probable cause to believe that an offense has been committed by the person named in the affidavit. Such affidavit must be sworn to positively but need not be made on personal knowledge.

2. In such case, if the patrolman is not actuated by malice and if he has reasonable and probable cause to believe that an offense has been committed by the person named in the affidavit, there would be no liability in the event such patrolman were mistaken.

3. The issuance of a citation at the scene of the accident commanding the offender to appear in court does not constitute arrest or restraint of liberty and, therefore, no cause of action would arise against such officer.

Respectfully,

THOMAS J. HERBERT,

Attorney General.