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Opinion Committee

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VIA CERTIFIED MAIL NO. Z 464 448 416

April 6, 1999

FILE # ML-40769-99
I.D. # 40769

Honorable John Cornyn
Office of the Attorney General
Opinions Committee
P. O. Box 12548
Austin, Texas 78711-2548

RQ-0053-JC

RE: Request for Attorney General Opinion Relating to Article 5.045, Texas
Code of Criminal Procedure

Dear General Cornyn:

This request for an Attorney General Opinion is submitted pursuant to Chapter 402, Subchapter C, of the Texas Government Code. This request relates to Article 5.045 of the Texas Code of Criminal Procedure which provides as follows:

Art. 5.045. Standby assistance; liability.

- (a) In the discretion of a peace officer, the officer may stay with a victim of family violence to protect the victim and allow the victim to take the personal property of the victim or of a child in the care of the victim to a place of safety in an orderly manner.
- (b) A peace officer who provides assistance under Subsection (a) of this article is not:
 - (1) civilly liable for an act or omission of the officer that arises in connection with providing the assistance or determining whether to provide the assistance; or

- (2) civilly or criminally liable for the wrongful appropriation of any personal property by the victim.

Article 5.01 of the Texas Code of Criminal Procedure outlines the legislative intent applicable to Article 5.045:

Art. 5.01. Legislative statement.

- (a) Family violence is a serious danger and threat to society and its members. Victims of family violence are entitled to the maximum protection from harm or abuse or the threat of harm or abuse as it permitted by law.
- (b) In any law enforcement, prosecutorial, or judicial response to allegations of family violence, the responding law enforcement or judicial officers shall protect the victim, without regard to the relationship between the alleged offender and victim.

Another relevant statute is Article 17.292 of the Code of Criminal Procedure that provides for the issuance of a Magistrate's Order for Emergency Protection. Also, Title 4 of the Texas Family Code provides for the protection of the family through protective orders. Orders issued under the authority of these statutes usually include the following warning;

“No person, including a person who is protected by this order, may give permission to anyone to ignore or violate any provision of this order. During the time in which this order is valid, every provision of this order is in full force and effect unless a court changes the order.”

BACKGROUND

Peace officers are often asked to escort victims of family violence back to the scene of the crime, usually the residence of the victim and the accused, to allow the victim to retrieve personal items. Such situation, commonly referred to as a “civil standby”, usually involves a tense situation between the victim and the accused. The request to the peace officer to perform the escort is typically made by a court, but is often made directly by the victim, accused, or attorney for either party.

While some peace officers believe that the language of 5.045(b) shields them from liability both immediately during a family violence assault and afterwards when escorting the victim back to the scene, other peace officers are not so sure.

One Hays County constable was recently contacted by an accused who had been placed under a magistrate's order for emergency protection. The accused asked the constable to escort him to his residence, where the victim continued to reside, so that he could retrieve some personal papers. He indicated that the justice of the peace who had issued the

emergency order had told him to contact the constable and request that he escort him to the residence. The accused did not possess a written order from the justice of the peace. The constable indicated that he believed such an escort would violate the emergency order, but he agreed to telephone the victim to see if he could make arrangements that would accommodate the accused's need to retrieve his personal items. During the telephone conversation between the constable and the victim, she indicated that she had been expecting his call since the District Attorney's Office and the justice of the peace had informed her that a peace officer would be escorting her husband to the residence at some time. This fact scenario, along with others, have caused this constable to be concerned about the intent and interpretation of Article 5.045.

ISSUES

1. Does Art. 5.045(b), Texas Code of Criminal Procedure, provide the same protection against civil or criminal liability when a peace officer escorts the victim of family violence back to the scene of the family violence assault after the initial assault to allow the victim to retrieve personal items?
2. If a magistrate's order for emergency protection is in effect or if a temporary or permanent protective order provided for under Title 4 of the Texas Family Code is in effect, can any magistrate or lawyer, verbally or in writing, request that a peace officer provide an escort to the victim? Is the peace officer in violation of the emergency order or protective order if he provides such an escort since the warning on the order prohibits such contact between the accused and the victim?

DISCUSSION

There does not appear to be any interpretative case authority or other legal authority that addresses the issues presented. The Code Construction Act might provide some general guidance, however.

Section 311.012(a), Texas Government Code, provides that when construing statutes "words in the present tense include the future tense." While the language of Article 5.045 is written in the present tense, "the officer may stay...", the Code Construction Act provides that the statute might also contemplate a future action.

The Code Construction Act also defines the use of the word "may" when used in the text of statutory provisions. The Act provides that the use of the word "may" creates discretionary authority or grants permission or a power. Tex. Gov't Code, § 311.016 (1) (Vernon Supp. 1999). In fact, Article 5.045 clearly states that the "civil standby" may occur "in the discretion of the peace officer."

CONCLUSION

Thank you for your assistance in addressing these issues of importance to the law enforcement community. Attached for your reference are the statutes cited herein. Should you need any additional information or clarification please contact me at (512) 393-7600.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Wenk", written in a cursive style.

Michael Wenk
Hays County Criminal District Attorney

MW:jcm
Attachments