

LETTER OPINION
80-71

March 19, 1980 (OPINION)

Mr. Dwight F. Kalash
Assistant City Attorney
City Hall
Grand Forks, North Dakota 58201

Dear Mr. Kalash:

This is in response to your letter of February 28, 1980, wherein you state the following:

This letter is written at the request of James Clague, Chief of Police of the City of Grand Forks. The purpose of our letter is to request the opinion of the office of the Attorney General on the legality of police officers issuing a summons to appear in court to citizens using the uniform traffic complaint and summons form when the violation is a noncriminal traffic offense.

Central Legal Research at the University of North Dakota provided its opinion No. 256 to Judge Thomas Davies, Municipal Judge in the City of Fargo, relative to the subject on February 1, 1980. I have enclosed a copy of that memorandum for the convenience of your office. The memorandum very specifically relates to the issuing of a summons when it is lawful to arrest a citizen with or without a warrant and concludes that an officer may issue a summons whenever it would also be proper for him to arrest with or without a warrant. In misdemeanor cases, it is only proper for an officer to arrest without a warrant when the violation takes place in his presence, as we understand the law. Our specific question is, "Is it improper for a police officer to issue a summons to a citizen when the suspected violation relates to a noncriminal traffic offense as opposed to a misdemeanor crime?"

Could you also please have the Central Legal Research opinion reviewed and provide us with your opinion as to whether or not a police officer may not use a summons unless he is also authorized to make an arrest for conduct that would constitute a misdemeanor. The views of your office on these questions will be most beneficial to the administrator of city court here in Grand Forks.

Your letter of inquiry concerns those actions which must be taken by a police officer in response to violations of state traffic laws and city traffic ordinances. In reviewing your letter along with the memorandum, as prepared by Central Legal Research of the University of North Dakota School of Law, it would appear that there are two basic questions which need to be answered. First, what is the statutory authority which allows a police officer to issue a summons

to a violator of state traffic laws or city traffic ordinances?
Second, in what situations can a police officer issue a summons to a violator?

Authority for a police officer's issuance of a summons can be found in Section 39-07-07 of the North Dakota Century Code. That section states as follows:

39-07-07. HALTING PERSON FOR VIOLATING TRAFFIC REGULATIONS - DUTY OF OFFICER HALTING. Whenever any person is halted for the violation of any of the provisions of chapter 39-01 through 39-13, 39-18, 39-21, and 39-24, or of equivalent city ordinances, the officer halting such person, except as otherwise provided in section 39-07-09, may:

1. Take and name and address of such person;
2. Take the license number of his motor vehicle; and
3. Issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice.

Subsection 3 of Section 39-07-07 authorizes a police officer to issue a summons to a person who is halted for a violation of a state traffic law or city traffic ordinance and to notify him to appear at a time and place which is specified in the notice or summons.

Your attention is directed to Section 39-07-08 which states as follows:

39-07-08. HEARING - TIME - PROMISE OF DEFENDANT TO APPEAR - FAILURE TO APPEAR - PENALTY. The time to be specified in the summons or notice provided for in section 39-07-07 shall be within ten days after the issuance of such summons or notice unless the person halted shall demand an earlier hearing, and, if the person halted desires, he may have the right, at a convenient hour, to an immediate hearing or to a hearing within twenty-four hours. Such hearing shall be before a magistrate of the city or county in which the offense was committed. Upon the receipt from the person halted of a written promise to appear at the time and place mentioned in the summons or notice, such officer shall release him from custody. Any person refusing to give such written promise to appear shall be taken immediately by the halting officer before the nearest or most accessible magistrate, or to such other place or before such other person as may be provided by a statute or ordinance authorizing the giving of bail. Any person willfully violating his written promise to appear shall be guilty of a class B misdemeanor, regardless of the disposition of the charge upon which he originally was halted.

This statute indicates those actions which the police officer must take should the violator refuse to give written promise to appear as provided for in the summons. Furthermore, the statute provides that, upon receipt of the summons, the violator shall be released from custody.

Section 29-05-01 provides for a uniform traffic complaint and summons to be used "in cases involving violations of statutes or ordinances relating to the operation or use of motor vehicles". It is clear that the Legislature intended the use of the uniform traffic summons and complaint by police officers to institute and initiate those proceedings necessary upon the violations of state traffic laws and city traffic ordinances. A unique feature of Section 29-05-31, however, is the "promise to appear" language contained in the last paragraph. This language allows a police officer to command the violator to appear at a particular time and place in response to the actions of the police officer. As stated previously, a police officer does possess statutory authority, under Section 39-07-07(3), to issue a summons to a violator of state traffic laws or city traffic ordinances.

The Central Legal Research memorandum which you attached to your letter of inquiry makes numerous mention of North Dakota criminal Rule 4(a)(1),(2). Apparently, there is concern that the "summons" portion of Section 29-05-31 violates the dictates of Rule 4(a)(1),(2). The thrust of Rule 4 requires issuance of warrants and summonses by a neutral and detached magistrate. As stated, the uniform traffic complaint and summons allows issuance of a summons by a police officer. While this practice might raise certain questions of constitutional matters, we have been unable to locate an instance where such a practice, as provided for under statute, has been declared unconstitutional.

Furthermore, the legislative history behind the drafting of Rule 4(a)(2), dealing with the issuance of summons, clearly indicates an attempt to exempt the practice by a police officer of issuing a uniform traffic complaint and summons.

Section 29-05-31 (Uniform traffic complaint and summons) was recommended for consideration or reference. However, it was noted that under Rule 4(a)(2), this Section was superseded. It was later decided that Rule 4(a)(2) should not be applied to this section and therefore Section 29-05-31 should be retained (as "considered").

* * *

Attention then focused on Section 29-05-31 (Uniform Traffic Complaint and Summons). Mr. Sand MOVED to delete any reference to Section 29-05-31 from the Explanatory Note. A SUBSTITUTE MOTION was made to place Section 29-05-31 in the classification of statutes "Considered". This was SECONDED and the motion CARRIED.

(Minutes of Joint Committee, Rules of Criminal Procedure, January 27-29, 1972, pp. 7, 16.1

Your letter of inquiry also makes mention of noncriminal traffic offenses. It is assumed that this is in reference to Section 39-06.1-02 which states as follows:

39-06.1-02. TRAFFIC VIOLATIONS NONCRIMINAL - EXCEPTIONS -

PROCEDURES. Any person cited, in accordance with the provisions of sections 39-07-07 and 39-07-08, for a traffic violation under state law or municipal ordinance, other than an offense listed in section 39-06.1-05, shall be deemed to be charged with a noncriminal offense and may appear before the designated official and pay the statutory fee for the violation charged at or prior to the time scheduled for a hearing, or, if he has posted bond in person or by mail, he may forfeit bond by not appearing at the designated time. If the person appears at the time scheduled in the citation, he may make a statement in explanation of his action, and the official may at that time, in his discretion, waive, reduce, or suspend the statutory fee or bond, or both. If the person cited follows the foregoing procedures, he shall be deemed to have admitted the violation and to have waived his right to a hearing on the issue of commission of the violation. The bond required to secure appearance before the official designated in the citation shall be identical to the statutory fee established by section 39-06.1-06. Within ten days after forfeiture of bond or payment of the statutory fee, the official having jurisdiction over the violation shall certify to the licensing authority:

1. Admission of the violation; and
2. In speeding violations, whether the speed charged was in excess of the lawful speed limit by more than nine miles >14.48 kilometers! per hour and the miles >kilometers! per hour by which the speed limit was exceeded.

This section shall not be construed as allowing a halting officer to receive the statutory fee or bond, unless he is otherwise authorized by law to do so.

A careful reading of this statute will indicate that violations of state traffic laws or city traffic ordinances are not considered noncriminal offenses. Instead, the statute clearly indicates that any person cited with a violation of a state traffic law or city traffic ordinance is "deemed" to have been charged with a noncriminal offense. After labeling the violator's charge as noncriminal, the statute then outlines several unique procedures which the violator may follow in response to the citation.

There is nothing in Section 29-06.1-02 which attempts to label or categorize traffic laws or ordinances. Instead, the goal of this statute is to provide a simplified method of processing traffic law citations where the violator does not have to take formal steps or make court appearances in order to resolve the matter. Furthermore, this statute does not contain language which contradicts the specific legal authority given to police officers under Sections 39-07-07 and 39-07-08.

After concluding that the police officer is legally able to issue a summons to a person who has allegedly violated a state traffic law or city traffic ordinance, it is necessary to consider under those circumstances that such a summons may be issued.

The procedure by which a violator is halted and is issued a uniform traffic complaint and summons by a police officer constitutes an arrest. The definition of an arrest is found in Section 29-06-01.

29-06-01. "ARREST" DEFINED. An arrest is the taking of a person into custody in the manner authorized by law to answer for the commission of an offense.

The prerequisites of an arrest, as dictated by Section 29-06-01, are satisfied in those situations where a uniform traffic complaint and summons is issued by a police officer to a violator of a state traffic law or city traffic ordinance. First, although the term "offense" is not defined in Chapter 29-06, it is defined in Section 12.1-01-04 to mean "conduct for which a term of imprisonment or a fine is authorized by statute after conviction". As state traffic laws and city traffic ordinances provide for imprisonment or fine upon conviction of prohibited conduct, it is clear that such laws and ordinances do constitute an offense.

Second, the procedure "authorized by law" for "the taking of a person into custody" is set forth in Section 39-07-07. As stated previously, this statute allows the police officer to issue a summons to the violator commanding him to appear on a certain date. Furthermore, Section 39-07-08 states that the officer "shall release him >violator! from custody" upon receipt of summons.

As the arrest of a violator of state traffic laws or city traffic ordinances is usually made without a warrant, the standards for such an arrest are located in Section 29-06-15.

29-06-15. ARREST WITHOUT WARRANT. A peace officer, without a warrant, may arrest a person:

1. For a public offense, committed or attempted in his presence; and for the purpose of this subsection a crime shall be deemed committed or attempted in his presence when what the officer observes through his senses reasonably indicates to him that a crime was in fact committed or attempted in his presence by the person arrested.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony in fact has been committed, and he has reasonable cause to believe the person arrested to have committed it.
4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested.
5. For such public offenses, not classified as felonies and not committed in his presence as provided for under section 29-06-15.1.
6. On a charge, made upon reasonable cause, of driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages.

The critical language of this section is as follows:

. . .and for the purposes of this subsection a crime shall be deemed committed or attempted in his presence when what the officer observes through his senses reasonably indicates to him that a crime was in fact committed or attempted in his presence by the person arrested.

Although this statute allows a police officer to utilize his senses in determining whether a crime (the term "crime" appears to refer to the term "public offense") was in fact committed or attempted, the clear intent of the law is for such offense to have been committed or attempted in the presence of the peace officer. Therefore, when that which an officer observes through his senses reasonably indicates to him that an offense was in fact committed or attempted, but such offense was not committed or attempted in his presence, then the police officer is unable to arrest such person without a warrant.

With respect to arrests made by highway patrol officers specifically for the violation of laws regulating the operation of motor vehicles, the arrest standard of Section 29-06-15(1) is reflected in Section 39-03-09(2), which states as follows:

39-03-09. POWERS OF HIGHWAY PATROL. The superintendent and each member of the highway patrol, shall have the power:

* * *

2. To make arrests upon view and without warrant for any violation committed in his presence of any of the provisions of this title relating to operator's licenses, or of title 24 relating to highways or to other laws regulating the operation of vehicles or the use of highways. (Emphasis added)

Naturally, this office is unable to respond with a definitive rule determining when a crime is attempted or committed in the presence of a police officer. Instead, the facts and circumstances of each individual case must be consulted to arrive at this determination.

To respond to your specific questions, it is our opinion that a police officer does possess statutory authority to issue a summons to a citizen upon his violation of a state traffic law or a city traffic ordinance. The fact that the person receiving the citation is deemed to have been charged with a noncriminal offense does not affect this conclusion. As the halting of the violator and the issuance of the uniform traffic complaint and summons constitutes an arrest, and such arrest is most commonly made without the use of a warrant, the provisions of Section 29-06-15 must be consulted in determining whether there is statutory basis for such arrest.

Sincerely,

ALLEN I. OLSON

Attorney General