

December 8, 2006

The Honorable Richard D. Welch
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

SYLLABUS:

2006-048

1. A county sheriff and deputy sheriffs are prohibited from using county law enforcement vehicles to run personal errands, or otherwise using county vehicles for their personal use and benefit.
2. A county sheriff and deputy sheriffs may not use a non-employee family member to help transport and process persons accused or convicted of committing a crime, or persons who are mentally ill or believed to be mentally ill.



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OPINION NO. 2006-048

The Honorable Richard D. Welch
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

Dear Prosecutor Welch:

You have asked whether the county sheriff or his deputies are permitted to use county law enforcement vehicles for personal use, such as running errands for family members and transporting family members to school events and activities, inside and outside of the county. For the reasons set forth below, we conclude that a county sheriff and his deputies are prohibited from using county vehicles for activities unrelated to the business of the county.

Personal Use of County Vehicles

The board of county commissioners is charged with purchasing or leasing motor vehicles “for the use of any elected county official or his employees,” R.C. 307.41, and the use of these vehicles is “subject to the regulation of the board of county commissioners,” R.C. 307.42. The personal use of county vehicles is twice explicitly forbidden by statute. R.C. 307.42 states: “No official or employee shall use or permit the use of any vehicle or any supplies for it, except in the transaction of public business or work of the county.” R.C. 307.43 states: “No person shall use or drive any automobile, motorcycle, or other conveyance owned, hired, or leased by the board of county commissioners for the use of any county official or employee, for any purpose other than the transaction of official business or in a ridesharing arrangement established in accordance with [R.C. 1551.25].” *See* R.C. 307.99(A) (whoever violates R.C. 307.42 will be “fined not less than twenty-five nor more than one hundred dollars for each offense”); R.C. 307.99(B) (whoever violates R.C. 307.43 will be “fined not less than twenty-five nor more than two hundred dollars, and imprisoned not less than ten nor more than sixty days”). *See also* R.C. 124.71 (“[n]o person shall willfully operate a motor vehicle [or] motor vehicle with auxiliary equipment ... owned or to be operated by the state or a political subdivision, without reasonable cause to believe that the specific use or operation is one that is properly authorized. Whoever violates this section shall be fined not more than one hundred dollars”).

In light of the plain and unambiguous language of R.C. 307.42 and R.C. 307.43, we conclude that, the county sheriff and the sheriff’s employees are prohibited from using county

law enforcement vehicles for their personal use, whether the vehicles are driven within or outside the county.¹ See generally *State v. Kreischer*, 109 Ohio St. 3d 391, 2006-Ohio-2706, 848 N.E.2d 496, at ¶12 (“[s]tatutory interpretation involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written”); *Swetland v. Miles*, 101 Ohio St. 501, 502-503, 130 N.E. 22 (1920) (“[i]f there is no room for doubt as to [a statute’s] scope and meaning, there is no right to construe, for the judicial right to construe is wholly based upon the presence of doubt as to the meaning of the statute”).

This conclusion is consistent with common law principles prohibiting county sheriffs and other public servants from using the resources of their public office for personal gain or benefit. As aptly summarized in 1933 Op. Att’y Gen. No. 651, vol. I, p. 568, at 569: “inasmuch as the legislature has provided for the payment of a definite salary to the sheriff for the performance of the duties of his office ... and has further provided that the sheriff shall be reimbursed for any necessary expenses in performing the duties of his office, it cannot be supposed that there was any intention on the part of the legislature to set up a system whereby the sheriff might make a personal profit from it, in addition to his salary, out of the performance of the duties of his office.” See *Kohler v. Powell*, 115 Ohio St. 418, 425, 154 N.E. 340 (1926) (the county sheriff has no right to make a personal profit out of the moneys provided to him by the county to feed prisoners in the county jail—“[p]ublic money may be used only for public purposes and never for private gain”); 1936 Op. Att’y Gen. No. 6071, vol. III, p. 1392 (the county has no authority to pay the expenses of a telephone in the private residence of a deputy sheriff, when such residence is not at the county jail). *But cf.* 1988 Op. Att’y Gen. No. 88-058 (syllabus) (“[i]n the exercise of discretion pursuant to R.C. 307.01, a board of county commissioners may pay the cost of utilities furnished to a sheriff’s residence that is located in the county jail, provided that the county commissioners determine that the provision of such utilities is for the best interest of the public and necessary either for the proper performance of the sheriff’s duties or for the proper care and maintenance of the building”).

We are not unsympathetic to the reality that a county sheriff is on duty twenty-four hours a day, and may be faced at any time with an emergency where he must have quick access to his official vehicle, with its distinctive markings and special equipment. In light of the unambiguous prohibitions in R.C. 307.42 and R.C. 307.43, however, we cannot approve the sheriff’s personal

¹ A county officer or employee who drives a county vehicle for personal reasons risks personal liability for damages he causes while operating the vehicle. An officer or employee of a political subdivision is immune from tort liability only if the officer’s or employee’s acts or omissions were not “manifestly outside the scope of the employee’s employment or official responsibilities” (and so long as the officer or employee did not act “with malicious purpose, in bad faith, or in a wanton or reckless manner”). R.C. 2744.03(A)(6).

use of his official vehicle.² A resolution of the competing benefits and concerns involving the proper use of law enforcement vehicles must come from the General Assembly.

Your second question is whether “an elected sheriff or an appointed deputy [may] utilize the services of a non-employee family member, such as his spouse, to assist in the transport and handling of prisoners or mentally ill persons, especially female persons, both inside and outside of the county in which the sheriff is elected or the deputy is appointed.”³ You have asked us to address, as part of our answer to your question, the issue of whether the county would incur liability if the non-employee family member were injured or killed while assisting the sheriff with the transport, handling, or processing of the prisoners or mentally ill persons.⁴ Because of the nature of the responsibility for transporting prisoners and mentally ill persons, we conclude that a sheriff or deputy may not use non-employee family members to fulfill this function.

² The Ohio ethics laws, R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 impose statutory standards of ethical conduct upon public officials and employees, and also may be relevant to your question. *See, e.g.*, Ohio Ethics Comm’n, Advisory Op. No. 96-004, slip op. at 5 (“[a] public official’s or employee’s duty is to the exercise of the public trust by performing the tasks assigned to him by the public agency with which he serves.... A public agency provides resources to its officials and employees for the performance of these tasks and not for the official’s or employee’s personal financial gain or benefit”). The Ohio Ethics Commission has the authority to issue advisory opinions regarding the application of these statutes, R.C. 102.08, and thus the Attorney General’s policy is to refrain from issuing opinions interpreting them. 2004 Op. Att’y Gen. No. 2004-044 at 2-380, n.7; 1987 Op. Att’y Gen. No. 87-025 at 2-179. Either you or the county sheriff may wish to consult the Ethics Commission about application of the ethics laws to your question.

³ 2000 Op. Att’y Gen. No. 2000-024 sets forth numerous statutes that impose upon county sheriffs the responsibility for transporting persons accused or convicted of committing a crime. For examples of statutes imposing upon the sheriff a duty to transport persons who are mentally ill, or believed to be mentally ill, *see* R.C. 2945.371; R.C. 5122.10; R.C. 5122.11; R.C. 5122.141; R.C. 5122.22; R.C. 5122.26.

⁴ You also have asked us to address whether this arrangement would “violate any employment laws, rules or regulations related to the operation of the sheriff’s department or otherwise related to county employees.” Although we will address any relevant statutes as part of our analysis, you and the county sheriff are in a better position than this office to know about application of local rules and regulations. You and the sheriff should certainly examine any collective bargaining agreements between the sheriff’s office and its employees. *See Cleveland Police Patrolmen’s Ass’n v. City of Cleveland*, 118 Ohio App. 3d 584, 693 N.E.2d 864 (Cuyahoga County 1997) (patrol officers’ bargaining representative successfully challenged a city’s plan to transfer the duty of transporting prisoners from patrol officers to guards at institutional facilities who were not certified as peace officers).

Transportation of Prisoners and Mentally Ill Persons is a Law Enforcement Duty

We are aware of no explicit prohibition that would bar a county sheriff or his deputies from enlisting non-employee family members to help transport prisoners and mentally ill persons. The statutory scheme for training and certifying peace officers leads us to conclude, however, that the use of non-employees in this way is impermissible.

No person may receive an original appointment as a peace officer unless the person completes a basic training program and is awarded a certificate by the executive director of the Ohio peace officer training commission attesting to his satisfactory completion of the program. R.C. 109.77. A “peace officer” is defined, for purposes of R.C. Chapter 109, to include a deputy sheriff “who is commissioned and employed as a peace officer” by a county, and “whose primary duties are to preserve the peace, to protect life and property, and to enforce the laws of this state.” R.C. 109.71(A). *See also* R.C. 311.07(A) (“[e]ach sheriff shall preserve the public peace”). The transport of prisoners has consistently been found to be a duty that preserves the peace, protects life and property, and enforces the laws of the state. As Judge (now Justice) O’Donnell wrote in *Cleveland Police Patrolmen’s Ass’n v. City of Cleveland*, 118 Ohio App. 3d 584, 693 N.E.2d 864 (Cuyahoga County 1997), “the function of transporting prisoners on the public highways among the general public is primarily a law enforcement duty with its attendant problems and concerns, including potential hostage, kidnap, escape or riot situations; medical emergencies, including stroke, seizure, and conditions requiring administration of CPR; necessity for training in the conduct of body and automobile searches; the use of force, including deadly force; and the protection and enforcement of the civil rights of the public and those being transported—all of which are directly related to preserving the peace, protecting life and property, and enforcing the law.” *Id.* at 588. The court concluded that jail guards whose primary function was to transport prisoners were required to be trained and certified as peace officers in accordance with R.C. 109.77. *See also* 1989 Op. Att’y Gen. No. 89-071 (special duty sheriffs who participate in prisoner transport, as well as patrol and parking duties, perform duties that relate to the preservation of peace, protection of life and property, and enforcement of the law, thereby qualifying those special deputies for classification as peace officers who must obtain certification and training pursuant to R.C. 109.71(A)(1) and R.C. 109.77).

Thus, even a deputy sheriff who is commissioned and employed by the sheriff must be trained and certified as a peace officer under R.C. Chapter 109 before he may perform the duty of transporting prisoners.⁵ We cannot logically conclude, therefore, that a non-employee, who is not a peace officer, may do so.

⁵ The requirement that a deputy sheriff be trained and certified under R.C. Chapter 109 before performing the duties of a peace officer, including the transport of prisoners, applies regardless of whether the deputy is a regular deputy sheriff or a special, reserve, or auxiliary deputy. *See State v. Glenn*, 28 Ohio St. 3d 451, 504 N.E.2d 701 (1986) (the responsibilities and training of a reserve deputy sheriff, who was killed while transporting a prisoner, were the same as a full-time deputy, although he served without remuneration, and the reserve deputy was a

2000 Op. Att’y Gen. No. 2000-024 addressed a question similar to yours—whether a county sheriff may use a private agency to transport a prisoner. Relying upon R.C. 311.07(A), which states that, “[e]ach sheriff shall preserve the public peace,” the opinion concluded that the sheriff could not delegate the duty to transport prisoners to a private entity—“a county sheriff who performs this function is performing a law enforcement duty that requires the exercise of judgment and discretion in order to safeguard the public and protect the civil rights of the public and prisoners.” *Id.* at 2-165. The duty to transport a prisoner “is a law enforcement duty because the sheriff is required to maintain custody and control over the prisoner in order to preserve the peace, protect lives and property, and enforce the laws of this state and the United States.” *Id.* “A county sheriff’s responsibility to maintain effective custody and control over a prisoner requires the sheriff to exercise his judgment and discretion,” and thus, “a county sheriff may not delegate this duty to a private entity.” *Id.* at 2-165 to 2-166.⁶ *Cf. Workman v. Franklin County*, No. 00AP-1449, 2001 Ohio App. LEXIS 3818 (Franklin County Aug. 28, 2001), at *12 (the “transportation of prisoners to a county courthouse is not characterized as an activity customarily engaged in by nongovernmental persons,” for purposes of determining the county’s liability under R.C. Chapter 2744 for injuries sustained by a bystander when a prisoner escaped during his transportation by a deputy sheriff to the courthouse).

Although we have focused on transporting prisoners, the transportation of persons who are mentally ill would also entail preserving the peace, protecting life and property, and enforcing the laws of this state, and would present many of the same risks named in *Cleveland Police Patrolmen’s Ass’n v. City of Cleveland*. For example, a sheriff may take into custody a person who the sheriff believes to be a “mentally ill person subject to hospitalization by court order,” who “represents a substantial risk of physical harm to self or others if allowed to remain at liberty pending examination.” R.C. 5122.10. *See* R.C. 5122.01(B) (defining a “mentally ill

peace officer as defined in R.C. 109.71); *Franklin County Sheriff’s Department v. State Employment Relations Board*, 63 Ohio St. 3d 498, 589 N.E.2d 24 (1992) (where deputy sheriffs were required to obtain a valid Ohio Peace Officer Training Certificate within one year of their appointment in order to qualify for an auxiliary commission); 1989 Op. Att’y Gen. No. 89-071 (*supra*); 1977 Op. Att’y Gen. No. 77-027 at 2-102 (“a ‘special’ deputy sheriff must meet all the requirements of a regular deputy.... “The term ‘special’ relates not to an individual’s qualification as a deputy but to the nature of his assignment as a deputy and to the fact that his commission and powers may be limited consistent with such assignment”).

⁶ In 1999-2000 Ohio Laws, Part IV 7659 (Sub. H.B. 661, eff. March 15, 2001), the General Assembly enacted R.C. 311.29(E) and R.C. 5149.03(B) for the purpose of authorizing county sheriffs and the Adult Parole Authority, respectively, to contract with a private person or entity, subject to specified criteria, for the return of Ohio prisoners from outside of Ohio into Ohio. *See also* R.C. 5120.64 (contracts for the return of Ohio prisoners from outside Ohio). This legislation does not, however, authorize a sheriff to have non-employee family members assist him or his deputies in the transport of prisoners or persons who are mentally ill or believed to be mentally ill.

person subject to hospitalization by court order” to include a mentally ill person who, because of his or her illness “represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm,” or who “represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness”). *See also* R.C. 5122.11 and R.C. 5122.141 (if a court has probable cause to believe, or finds, that a person is a “mentally ill person subject to hospitalization by court order,” the judge may issue an order of detention ordering the sheriff to take into custody and transport the person to a hospital); R.C. 5122.22 (if a mentally ill patient is permitted to leave the hospital on a trial visit that is later revoked, the sheriff may be authorized to take into custody and transport to the hospital a patient who does not voluntarily comply with the revocation); R.C. 2945.371 (sheriff to transport for evaluation a criminal defendant whose competence to stand trial is raised or who enters a plea of not guilty by reason of insanity).

We are aware that, under these statutes, persons other than peace officers also are authorized to transport mentally ill persons. All of these persons, however, are professionally trained in law enforcement, such as parole officers, or are psychiatrists, psychologists, physicians, or “health officers,” trained to perform the duties under R.C. Chapter 5122. *See* R.C. 5122.01(J). Because of their training, they are specifically authorized by statute to perform duties that might otherwise fall solely within the purview of peace officers. Nothing in statute, however, authorizes a layperson to perform these duties.

Because we have concluded that the county sheriff and his deputies may not use non-employee family members to transport prisoners and persons believed to be mentally ill, we find it unnecessary to address your question concerning a county’s liability for using such a practice.

Called to Aid

We are aware that various statutes authorize a sheriff to call upon citizens for assistance, or impose a concomitant obligation upon citizens to provide assistance when called upon by law enforcement officers. A sheriff is authorized “[i]n the execution of [his] official duties to “call to [his] aid such persons or power of the county as is necessary.” R.C. 311.07(A). If the county does not have a sufficient jail or staff, the sheriff is authorized to “call such aid as is necessary in guarding, transporting, or returning” to another county’s jail persons accused or convicted of an offense. R.C. 341.12. Anyone who “neglects or refuses to render such aid, when so called upon, shall forfeit and pay the sum of ten dollars.” *Id.* And, “[n]o person shall negligently fail or refuse to aid a law enforcement officer, when called upon for assistance in preventing or halting the commission of an offense, or in apprehending or detaining an officer, when such aid can be given without a substantial risk of physical harm to the person giving it,” and whoever violates

this prohibition is guilty of a minor misdemeanor. R.C. 2921.23.⁷ The scope of these statutes does not, however, include the ongoing use of non-employees for the performance of routine duties.

Under the facts of *Mitchell v. Industrial Comm'n*, 57 Ohio App. 319, 13 N.E.2d 736 (Delaware County 1936), a deputy sheriff asked a visiting friend to accompany him and help arrest a person threatening to harm his wife and family, since the sheriff and other deputies were not available. The friend was killed in an automobile accident while returning with the prisoner. The court found that the deputy had the authority under G.C. 2833 (now R.C. 311.07) to call upon another person for assistance “in the temporary emergency created in part by [the sheriff’s] and other deputies’ absence.”⁸ *Id.* at 322. As explained by the court, G.C. 2833 contemplates “that exigencies may arise when a sheriff and his duly appointed force are not able to cope with the necessity of a particular temporary situation. It gives recognition to the fact that a *posse comitatus* may sometimes be necessary,” and “reposes in the sheriff the power to determine when such a necessity exists.” *Id.* at 321. In *Industrial Comm'n v. Turek*, 129 Ohio St. 545, 549, 196 N.E. 382 (1935), the court noted that, the predecessor of R.C. 2921.23, G.C. 12857, “was enacted for the purpose of enabling an officer to obtain immediate assistance when suddenly confronted with a dangerous emergency in apprehending, securing or conveying a person charged with, or convicted of, a crime,” and did not apply to a person who was asked on several occasions, by a village traffic patrolman, to accompany the patrolman on his rounds.⁹

⁷ The predecessor of R.C. 2921.23, G.C. 12857, included a prohibition against anyone neglecting or refusing to assist a sheriff in conveying to prison a person charged with, or convicted of, a criminal offense.

⁸ In *Mitchell v. Industrial Comm'n*, 57 Ohio App. 319, 13 N.E.2d 736 (Delaware County 1936), the court found that the deputy’s friend was acting in the service of the county under appointment by a county officer at the time he was killed, and thus his dependents were entitled to workers’ compensation benefits. (R.C. 4123.025 now provides for workers’ compensation coverage for any person who is injured or killed “as the direct result of performing any act at the request or order of a duly authorized public official” of the state or a political subdivision “in time of emergency.”) *But cf. Mitchell v. Great Eastern Stages, Inc.*, 60 Ohio App. 144, 19 N.E.2d 910 (Delaware County 1938), *aff’d on other grounds*, 140 Ohio St. 137, 42 N.E.2d 771 (1942) (under the same set of facts, the deputy’s friend was not an officer of the county, and the negligence of the deputy sheriff, who was driving, could not be imputed to the friend so as to defeat the wrongful death claim of the friend’s estate against a third party tortfeasor). *Cf. also Industrial Comm'n v. Turek*, 129 Ohio St. 545, 196 N.E. 382 (1935) (note 9, *infra*).

⁹ The court concluded in *Industrial Comm'n v. Turek*, that the person who was injured during the course of one of these patrols was not a village employee, and was not entitled to workers’ compensation. 129 Ohio St. at 549. *Cf. Stoeckel v. Industrial Comm'n*, 77 Ohio App. 159, 160, 66 N.E.2d 776 (Hamilton County 1945) (G.C. 12857 is “purely a penal” statute, “directed to compelling all citizens to recognize their reciprocal obligations of citizenship and

Under an appropriate set of circumstances, the sheriff or a deputy may rely upon one or more of these statutes to call a family member to his aid. The import of these statutes, however, is to empower a sheriff or deputy to call upon, or even compel, citizens to provide assistance in a temporary emergency, where he needs immediate assistance, and law enforcement officers are unavailable. They are not intended to enable a sheriff to address an ongoing personnel shortage by using family members to carry out the routine duties of his office.

County Obligations

We assume that the proposal to use non-employees springs from a lack of funds to use compensated employees. The sheriff could appoint reserve or special deputies, who are often unpaid, *see, e.g., State v. Glenn*, 28 Ohio St. 3d 451, 504 N.E.2d 701 (1986), although they are required to be trained and certified under R.C. Chapter 109 in order to work as a peace officer. *See note 5, supra*. Otherwise, the remedy lies with the board of county commissioners. *See Geauga County Bd. of County Commissioners v. Geauga County Sheriff*, Geauga App. No. 2002-G-2484, 2003-Ohio-7201, 2003 Ohio App. LEXIS 6508; *State ex rel. Trussell v. Meigs County Board of Commissioners*, 155 Ohio App. 3d 230, 2003-Ohio-6084, 800 N.E.2d 381 (Meigs County).

R.C. 325.07 states that the board of commissioners “shall make allowances monthly to each sheriff for his actual and necessary expenses incurred and expended in pursuing within or without the state or transporting persons accused or convicted of crimes and offenses, for any expenses incurred in conveying and transferring persons to or from any state hospital for the mentally ill, any institution for the mentally retarded, any institution operated by the youth commission, children’s homes, county homes, and all similar institutions, and for all expenses of maintaining transportation facilities necessary to the proper administration of the duties of his office.” *See generally* 1969 Op. Att’y Gen. No. 69-090. Indeed, a board of commissioners may advance money to the sheriff for the purpose of transporting prisoners to correctional institutions and the other institutions named above. R.C. 325.07. Also, although R.C. 341.05(A) explicitly recognizes the discretion of the board of county commissioners to limit, through its appropriation power, the sheriff’s employment of staff at the county jail, the board and sheriff must be aware of the sheriff’s obligation to “employ a sufficient number of female staff to be available to perform all reception and release procedures for female prisoners.” R.C. 341.05(B). Female employees must be on duty during the female prisoners’ confinement. *Id.*

can not be the basis for creating the relationship of employer and employee”). *See also Blackman v. City of Cincinnati*, 140 Ohio St. 25, 42 N.E.2d 158 (1942) (person whose car was commandeered by a police officer to chase a shooting suspect and damaged during the chase could not use G.C. 12857 to argue that his property was appropriated for a public use and compel the city to pay for the loss); *Brown v. City of Cincinnati*, 59 Ohio App. 3d 49, 571 N.E.2d 143 (Hamilton County 1989) (R.C. 2921.23 does not immunize a municipality from liability when a police officer negligently injures a private citizen who comes to the officer’s aid in subduing a suspect).

In conclusion, it is my opinion, and you are advised that:

1. A county sheriff and deputy sheriffs are prohibited from using county law enforcement vehicles to run personal errands, or otherwise using county vehicles for their personal use and benefit.
2. A county sheriff and deputy sheriffs may not use a non-employee family member to help transport and process persons accused or convicted of committing a crime, or persons who are mentally ill or believed to be mentally ill.

Respectfully,

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

JIM PETRO
Attorney General