



COMMONWEALTH of VIRGINIA

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Colonel W.S. Flaherty
Superintendent
Department of State Police
Post Office Box 7472
Richmond, Virginia 23261-7472

Dear Colonel Flaherty:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505(A) of the *Code of Virginia*.

Issues Presented

You inquire about the proper procedural steps a law enforcement officer must follow to obtain a blood sample pursuant to the implied consent law where the suspect has been transported to a medical facility for treatment. You specifically seek guidance as to what constitutes a valid arrest in such situations and as to the proper timing of issuance of a summons.

Response

It is my opinion that implied consent to a blood test is triggered by a valid arrest. If a common law arrest is not feasible because a defendant is in a medical facility, the arrest may be made by the issuance of a summons pursuant to § 19.2-73(B), because that summons is deemed an arrest document. If a summons is issued, it must be based on probable cause, and it must be issued before obtaining the blood draw. The suspect should be advised of the requirements of the implied consent law, after which the blood test may be administered. The arresting officer should remain with the suspect until after the blood is drawn and then release him on the previously issued summons. If the suspect objects to the blood test, he should be charged with a violation of § 18.2-268.3 (refusal to take a blood or breath test).

Applicable Law and Discussion

In Virginia, a valid arrest is a prerequisite for invoking the implied consent law and to the admission into evidence of any blood or breath test results. Virginia's implied consent statute provides in pertinent part:

Any person . . . who operates a motor vehicle upon a highway . . . in the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood . . . taken for a chemical test to determine the alcohol, drug, or both

alcohol and drug content of his blood, if he is *arrested* for [driving while intoxicated] . . . within three hours of the alleged offense.^[1]

Because the driver's timely arrest triggers the statutory consent provision, the arrest must be completed before the driver may be required to take the test.² Blood samples obtained in accordance with law are admissible at trial.³

Certain conditions must exist at common law for an officer to effectuate an arrest. Merely stating to a suspect that he is "under arrest" is not sufficient to constitute an arrest.⁴ Rather, "[a]n arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority."⁵ The General Assembly, however, has recognized the difficulty or unfeasibility of arresting a person through the exertion of physical force and submission to authority where the person is hospitalized. In situations where a suspected intoxicated driver has been transported to a medical facility, § 19.2-73(B) allows for issuance of a summons without detaining the defendant through physical force, provided probable cause exists:

If any person under suspicion for driving while intoxicated has been taken to a medical facility for treatment or evaluation of his medical condition, the officer at the medical facility may issue, on the premises of the medical facility, a summons for a violation of [driving while intoxicated] and for refusal of tests . . . without having to detain that person, provided that the officer has probable cause to place him under arrest. *The issuance of such summons shall be deemed an arrest* for purposes of Article 2 (18.2-266 et seq.) of Chapter 7 of Title 18.2.^[6]

A summons serves, under § 19.2-73(B), as the arrest document.⁷ Accordingly, when a summons is issued pursuant to § 19.2-73(B) for a person suspected of driving while intoxicated, the person will be deemed to have been arrested for purposes of applying the implied consent law. It is the *arrest*, not the *custody*, of the suspect that triggers the implied consent law. If the suspect does not submit to the blood draw after being served with the summons, he may be charged with refusal.⁸

Thus, a person suspected of driving while intoxicated who has been transported to a medical facility may be issued a summons under § 19.2-73(B), provided probable cause exists. Once that summons has been issued, there has been a valid arrest, and the blood test may then be administered. In

¹ VA. CODE ANN. § 18.2-268.2(A) (2014) (emphasis added).

² *Bristol v. Commonwealth*, 272 Va. 568, 574-75, 636 S.E.2d 460, 464 (2006). In this case, a conviction of driving while intoxicated was reversed because no summons was issued until several days after the blood test had been administered. Also, while the defendant was had been told that he was under arrest prior to administering the blood test, he was not in fact arrested at that time, and the officer left the medical facility after the blood test without detaining the defendant.

³ See § 18.2-268.7(C) (2014).

⁴ *Bristol*, 272 Va. at 573, 636 S.E.2d at 463.

⁵ *California v. Hodari D.*, 499 U.S. 621, 626-27 (1991) (emphasis original), accord *Hall v. Commonwealth*, 280 Va. 566, 701 S.E.2d 68 (2010); but see *Young v. Commonwealth*, 57 Va. App. 731, 706 S.E.2d 53 (2011) (rejecting the notion that arrest turns on insignificant formalities reminiscent of the medieval livery of seisin).

⁶ Section 19.2-73(B) (Supp. 2014) (emphasis added).

⁷ *Sprouse v. Commonwealth*, 53 Va. App. 488, 673 S.E.2d 481 (2009).

⁸ Section 18.2-268.3 (2014).

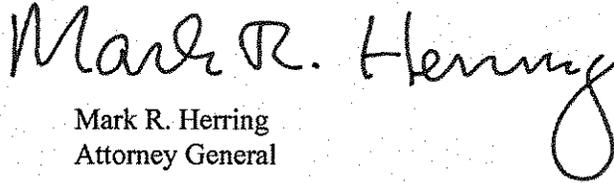
order to have admissible evidence that the blood test was administered in accordance with law, it would be prudent for the officer to remain with the defendant until the blood draw has been made.

Conclusion

Accordingly, it is my opinion that implied consent to a blood test is triggered by a valid arrest. If a common law arrest is not feasible because a defendant is in a medical facility, the arrest may be made by the issuance of a summons pursuant to § 19.2-73(B), because that summons is deemed an arrest document. If a summons is issued, it must be based on probable cause, and it must be issued before obtaining the blood draw. The suspect should be advised of the requirements of the implied consent law, after which the blood test should be administered. The arresting officer should remain with the suspect until after the blood is drawn and then release him on the previously issued summons. If the suspect objects to the blood test, he should be charged with a violation of § 18.2-268.3 (refusal to take a blood or breath test).

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General