

OFFICIAL OPINION NO. 87-29, Relative duties of city law enforcement and county law enforcement within the boundaries of a municipality

September 25, 1987

Sheriff Thomas Jensen  
Bennett County Sheriff's Office  
P.O. Box 726  
Martin, South Dakota 57551

OFFICIAL OPINION NO. 87-29

**Relative duties of city law enforcement and county law enforcement within the boundaries of a municipality**

Dear Sheriff Jensen:

You have requested an official opinion based upon the following factual situation:

*FACTS*

The City of Martin does not maintain a police force but contracts for law enforcement with the county. The City is considering the employment of two officers but wishes to limit their authority to the investigation of violations of the City ordinances and the arrest of violators of such ordinances. The City apparently wishes its officers to avoid any duties with regard to state created felonies. You indicate that the City desires that the Sheriffs Office assume such duties. You also indicate that there is a possibility that the City may discontinue its contract with the county for law enforcement and may also simply decline to hire any police officers at all.

Based upon these facts, you have asked the following questions.

*QUESTIONS:*

1. Assuming the City hires two police officers, can it limit the power of these officers to the enforcement of city ordinances and not allow the officers to enforce state or federal criminal laws?

2. Assuming the City hires two police officers, can it limit the power of these officers to the enforcement of city ordinances and not allow the officers to enforce state or federal criminal laws?

3. Assuming for the sake of this question alone that the City declined to maintain a police force, to what extent is the county obligated to provide a regular patrol of the city. Furthermore, will the sheriff be found liable for failure to provide such a patrol?

*IN RE QUESTION NO. 1:*

The answer to your first question is found in SDCL 9-29-19 which states:

All policemen of any municipality shall possess the powers of constables. They may pursue and arrest any person fleeing from justice in any part of the state, and when performing the duties aforesaid may arrest and detain any person guilty of any breach of the peace or any violation of the laws of the state or ordinance of the municipality. (Emphasis added.)

In State v Hirsch, 309 N.W.2d 832 (S.D. 1981), the court stated that SDCL 9-29-19 "authorizes municipal police to arrest for violation of state laws within municipal boundaries." The court also stated that SDCL 9-29-1 gave the municipal police authority to arrest a DWI suspect within one mile of the city boundaries. Hirsch thus affirmatively recognizes that the Legislature has directly granted local police the power to arrest for violations of state law. Similarly, it cannot be denied that city police are "law enforcement officers" for the purpose of both SDCL 22-1-2(20) and 23-3-7(20). See generally, Attorney General Opinion No. 78-03.

It is clear that the statutes contemplate that city police officers shall have full authority with regard to both state-created felonies and city ordinances. Such authority is implicit in the statutes cited and is explicit in the Supreme Court decision cited.

Moreover, the city may not limit this legislatively-created authority. As the South Dakota Supreme Court through former Justice Wollman has held:

A governing body of a municipality possesses only such authority as is conferred upon it by law together with such powers as are necessary to carry into effect those granted.

City of Sioux Falls Municipal Employees Assn. Inc. v. City of Sioux Falls, 233 N.W.2d 306, 309 (S.D. 1975).

It is apparent from the language cited above that the authority of city policemen may not be limited by the city. The Legislature did not grant the city the authority to abrogate powers granted by it to the police. As stated by the Michigan Supreme Court: "local ordinances must give way to conflicting [state] constitutional and statutory provisions." City of Livonia v. Department of Social Services, 378 N.W.2d 402, 416 (Mich. 1985). See also, AGO 73-8; AGO 87-15; 62 C.J.S Municipal Corporations § 563, p. 1052.

SDCL 9-29-2 does not compel a different result. This statute states:

Every municipality shall have power to regulate the police of the municipality and pass and enforce all necessary police ordinances.

In 1967-68 AGR, p. 416, my predecessor examined this and other statutes and concluded that:

You are advised that these and similar provisions of our Code indicate the intention of the Legislature that local peace officers are charged with the duty and it is their responsibility to keep and preserve the peace within their respective jurisdictions, including any state owned land within the limits of each and every political subdivision of the state and toward that end to make investigations and arrests on premises owned by the State of South Dakota when located within such limits.

In other words, this office has viewed SDCL 9-29-2 as imposing a "duty" to keep the peace upon municipal police departments. When city officials undertake to implement SDCL 9-29-2, they must implement it with a view to keeping the peace and that includes enforcement of State-created felonies.

My answer to your first question is NO.

*IN RE QUESTION NO. 2:*

The answer to your next question is, of course, that both the city police and the county sheriff have the duty to investigate all crimes, including felonies, committed within the city. See generally, 1967-68 AGR, p. 416. SDCL 9-29-19, as noted above, indicates that the city police have the authority to arrest "any person guilty of...any violation of the laws of the state...." The authority to arrest for such a violation certainly indicates some

authority to investigate such violations. With regard to the sheriff's office, SDCL 9-29-20 states:

The sheriff or any constable of the county or counties in which the municipality is situated may serve any process or make any arrest authorized to be made by any municipal officer.

Your implicit question, however, is more complex; you have implicitly asked whether the city police or the county sheriff has the primary duty to investigate felonies committed within the city.

Some brief history might be helpful. The office of county sheriff was created in 1862 at the first territorial legislature. Dakota Territory, Laws of 1862, Chapter XXIII, Section 2, and 18. The office of city policeman was not created until later. It was apparently not until 1890 that the general powers of a policeman were set out in statute. Session Law 1890, Chapter 37, Article XIII, Section 1. Earlier statutes had, however, apparently set out the powers for police forces in special statutes. See, Rev. Code, Territory of Dakota, Code of Criminal Procedure, Chapter IV, Section 41.

It might be asked why the Legislature found it necessary to encourage the creation of municipal police departments, when the county sheriff's office already existed.

The case of State ex rel. Thompson v. Reichman, 188 S.W. 225, 228 (Tenn. 1916) provides one answer:

One of the chief reasons for the incorporation of towns and cities is to provide, in the more densely populated sections, better police protection, than, in the nature of things, the sheriff's office can afford.

In my view, a finding that better police protection was one reason for the creation of municipalities and of their police departments is rational. Further, it follows from this that the municipal police force was intended to have primary responsibility for the investigation and arrest of all felonies within its boundaries. Otherwise, the creation of a police force would be a fairly trivial act. A police force which cannot or which does not investigate felonies in the normal course of its business is one of extremely limited scope and is not one which would provide substantially better police protection for the people of a municipality than the sheriff's office would provide. In other words, if the purpose of a police force is actually to enhance law enforcement, then it follows that the police force has a duty to

investigate felonies and arrest for violation of these felonies. Since the police are established to patrol a city, it follows that they are to have the first or primary line of responsibility in the city.

Furthermore, it is my view that this conclusion is supported by the language of the statutes themselves. The statute conferring powers on the cities provides that the police may arrest for "any violation of the laws of the state." SDCL 9-29-19. Certainly there is no implication here that the city police should call the sheriff's department when there is a serious matter.

Likewise, SDCL 9-29-20, which grants the sheriff the authority to act in a municipality, does not in any way suggest that the authority of the sheriff's office should be the first authority called upon. The statute merely says that the sheriff may "make any arrest authorized to be made by any municipal officer."

In sum, if it is granted that one of the purposes for which people organize themselves into communities and municipalities is to provide better police protection, and if it is granted that this better police protection is only conferred when the police have the power to act against the most threatening acts, i.e. those acts which ordinarily are punishable as felonies under state law, then it seems logical to assume that the municipal police force has the primary responsibility for an investigation of felonies under state law when those felonies take place within the municipal boundaries. Further, while the bare outlines of the state statutes do not provide a definitive answer, the statutes, when read together, support this conclusion.

Finally, I would point out that other language in Reichman also supports this conclusion. Reichman states in a paragraph following that quoted above:

When, therefore, a city has patrolling its streets a police force employed expressly to detect Crime and apprehend offenders, the sheriff, in the absence of information to the contrary, is justified in assuming that the city officials will do their duty...

188 S.W. at 228.

Reichman thus puts the primary responsibility for all law enforcement within the municipality on the municipal police, making no distinction between felony and non-felony

offenses. See also, Brownstown Township v. County of Wayne, 242 N.W.2d 538 (Mich. App. 1976).

I conclude that city police forces created by SDCL 9-29-18 and 19 were intended to provide comprehensive law enforcement services within a municipality and that the municipal police force has the primary responsibility, in the ordinary case, for the investigation of felonies which occur within a municipality.

*IN RE QUESTION NO. 3:*

Your final question assumes that the city chooses to entirely forego taking any responsibility for providing police protection within a city. You have asked whether the county is compelled to patrol the streets of the city when the city refuses to provide any police protection at all. It is my opinion that the sheriff is not under a duty to patrol the streets of the city on a regular basis in such a situation in the absence of special circumstances as described below.

The authority of the sheriff's office in South Dakota to engage in patrolling has been generally thought to be narrow. This office has said, for example, that "a sheriff cannot recover travel expenses for merely patrolling the highway." 1957-58 AGR, p. 50. See also, 1951-52 AGR, p. 336. In 1973, my predecessor found that the basis for the earlier opinions had been undermined by a 1963 statute. He refused to find, however, a general authority to patrol county roads. In the case before him, he found that the county commission would be justified in authorizing a patrol "in light of the high rural crime rate in County X." AGO 73-35. He warned, however, that a general patrol would probably not be a proper expenditure of county funds unless such activity has "some justification in necessity and reality." Id.

The opinions of this office, then, do not allow a regular patrol of county roads by the sheriff in the absence of a valid justification. These opinions imply that a regular patrol by the sheriff of city streets would likewise be an improper expenditure, again in the absence of such justification. Cases from other jurisdictions tend to support this thesis. In State ex rel. Windham v. LaFever, 486 S.W.2d 740, 744 (Tenn. 1972) the court found:

it is the duty of all county sheriffs to maintain law and order in parts of the county which the sheriff knows are not being adequately policed by local authorities, which calls for the exercise of a reasonable degree of activity and diligence on the part of the sheriff to keep

informed of conditions in his county, but does not require him to 'patrol all roads and highways in the County regularly.'

Likewise, in Brownstown Township v. County of Wayne, supra, the court found that the county did not have a duty to supply a full time road patrol on all county roads and highways.

In line with this authority, then, it is my opinion that the county sheriff would not ordinarily have a duty to provide a regular patrol of city streets when the city refuses to provide for its own law enforcement. It is possible, however, that a "special need" for a patrol might arise in an unprotected city. Just as the sheriff cannot ignore lawbreaking outside the boundaries of cities, he likewise cannot ignore lawbreaking within the boundaries of a city with impunity.

Moreover, it is my opinion that when a sheriff becomes aware that a city is ignoring its law enforcement responsibilities, he has a special duty to inform himself of the situation within that city. The Reichman case considered the situation in which city police were deliberately ignoring an unlawful situation; its language is nonetheless helpful here. Reichman states that if the sheriff knows that the city officials are deliberately ignoring or permitting a certain class of offenses, his duty to prevent and suppress such offenses is the same it would be if there were no municipality and no police force.

Reichman, 188 S.W. at 228. In short, while the county sheriff's office need not ordinarily maintain a regular patrol within a city which refuses to provide for its own law enforcement, the sheriff's office nonetheless has an obligation to be attentive to the public safety within that city as well as within other parts of the county. The sheriff and his deputies must "keep their eyes open for evidence of public offenses" and pursue the offenders when discovered." Reichman, Id.

This duty continues to exist and is to some degree enhanced when a city totally ignores its law enforcement responsibilities. Thus, a special need to patrol the city might, in such cases, arise. See generally, AGO 73-35.

In sum, in answer to the first part of Question 3, it is my opinion that there is ordinarily no need for the sheriff to engage in a regular patrol of a city which refuses to provide for its own protection; such a need might, however, arise in particular circumstances and the

sheriff should take great care to determine whether circumstances exist which threaten the public peace and safety in the city.

The final part of your third question raises the potential liability of the sheriff's office for failure to provide a regular patrol of the city. Assuming that the sheriff's office follows, in good faith as objectively evaluated, the law as set forth in this opinion, the Sheriff's office should not find itself liable for its actions. See generally, Anderson v Creighton, \_\_\_\_ U.S. \_\_\_\_ 107 S.Ct. 3034 (1987); Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). As those in law enforcement know too well, however, no final answer can be given on liability questions except by the courts.

This opinion does not consider cross-deputization agreements either between municipal and county governments or between either of these political subdivisions and an Indian tribe. Moreover, it does not consider the potential scope of intergovernmental arrangements pursuant to SDCL 1-24 or 9-12-4.

Sincerely,

Roger A. Tellinghuisen  
Attorney General