Opinion 05-05

November 15, 2005

OPINION OF: PATRICIA A. MADRID Attorney General

BY: Arthur W. Pepin, Assistant Attorney General, Director, Criminal Appeals Division

TO: Honorable Kari Brandenburg, Office of the District Attorney, 2nd District, 520 Lomas Blvd. NW, Albuquerque, NM, 87102

QUESTION:

Whether a law enforcement officer may arrest, without a warrant, an offender who committed a misdemeanor domestic violence offense and left the scene prior to the officer's arrival? If so, what—if any—special considerations are there attendant to such an arrest?

CONCLUSION:

Police officers have statutory authority to arrest an offender for these misdemeanors provided that the arrest is reasonably prompt and reasonably necessary to protect the victim. The Family Violence Protection Act embodies strong public policy when it requires officers to take steps to protect the victim of domestic violence, including arrest of the abuser when appropriate. The "at the scene" language in the misdemeanor arrest statute should not be read to contradict this public policy. Although a legislative change to make the law even clearer would be helpful, the arrest authority as provided in current law appears to be only limited by what is reasonable under the circumstances.

FACTS AND BACKGROUND:

The question presented applies in the common fact pattern where, when police respond to a reported act of domestic violence, they encounter the victim but not the aggressor. At the scene, usually informed by reports from the victim or other witnesses, the police learn or suspect the aggressor can be found at a location where they can go and find the aggressor. Some officers feel constrained by the law from arresting the aggressor in these circumstances unless the aggressor is found physically right at the scene of where the domestic violence occurred.

ANALYSIS:

Police officers are usually limited when making a misdemeanor arrest by the requirement that the misdemeanor be committed in the officer's presence, a rule created by the courts and not required by either the New Mexico Constitution or the United States Constitution. See Boone v. State, 105 N.M. 223, 226, 731 P.2d 366 (1986) ("We long have held that, in the absence of statutory authority, a duly authorized

peace officer may make an arrest for a misdemeanor without a warrant only if he has probable cause or reasonable grounds to believe that the offense has been committed in his presence"). New Mexico has adopted a number of statutory exceptions to this rule. The exceptions include statutes authorizing misdemeanor arrests for shoplifting and for one at the scene of a motor vehicle accident. See NMSA 1978, Section 30-16-23 (1965) ("law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the crime of shoplifting"); NMSA 1978 Section 66-8-125 (1978) (officer may arrest without a warrant "any person present at the scene of a motor vehicle accident" where officer has "reasonable grounds to believe the person committed a crime"). The question presented here concerns the misdemeanor arrest authority of police in domestic violence situations. The two primary sources for such authority are found in the Family Violence Protection Act and in the Criminal Procedure Act's warrantless arrest statute that specifically addresses certain domestic disturbance misdemeanors.

The Family Violence Protection Act ("FVPA"), NMSA 1978, Section 40-13-2(C) (1995), defines "domestic abuse" as "any incident by a household member against another household member resulting in" a number of listed consequences, including physical harm, bodily injury or assault or threats thereof, and damage to property. A "household member" is any spouse, former spouse, family member (including a child) or any person with whom there is or was a continuing personal relationship even if that relationship lacks cohabitation. See NMSA 1978, Section 40-13-2(D) (1995). It is legislative policy that in domestic abuse incidents "New Mexico discourages dual arrests of persons involved" and requires that the "law enforcement officer, in making arrests for domestic abuse, shall seek to identify and shall consider whether one of the parties acted in self defense." NMSA 1978, Section 40-13-1.1 (2002).

This very strong policy favoring protection of domestic abuse victims is further codified in the following FVPA provision mandating arrest when reasonably required to protect the victim: "A local law enforcement officer responding to the request for assistance *shall* be required to take whatever steps are reasonably necessary to protect the victim from further domestic abuse" including "arresting the abusing household member when appropriate." NMSA 1978, Section 40-13-7(B)(5) (1995) (emphasis added). The legislative use of the word "shall" is important since that term is defined as mandatory, expressing a "duty, obligation, requirement or condition." NMSA 1978, Section 12-2A-4 (1997). In addition, the policy supporting arrests to protect victims is underscored by constitutional and statutory requirements to protect crime victims. See N.M.Const., art. II, section 24(A)(3); NMSA 1978, Section 31-26-2(C) (2003).

The other primary authority for domestic abuse misdemeanor arrest authority is the Criminal Procedure Act. See NMSA 1978, Section 31-1-1 to –7 (amended through 1995). The Act's warrantless arrest statute provides, "a peace officer may arrest a person and take the person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause to believe that the person has committed an assault or battery upon a household member." NMSA 1978, Section 31-1-

7(A) (1995) (emphasis added). The "household member" definition is the same as that in the FVPA.

Tension arises from the phrase, "[w]hen the officer is at the scene of a domestic disturbance" because this phrase can be read to limit the officer's misdemeanor arrest authority to arresting only a person directly and physically at the scene of the disturbance at the same time as the police officer. Such an interpretation would be antithetical, however, to the purpose and tenor of both the FVPA and the specific grant of misdemeanor arrest authority in Section 31-1-7, since it would undercut the most useful application of such authority. It is difficult to articulate a rational policy for allowing an officer to arrest an aggressor who remains at the scene but not allow the officer to arrest an aggressor who flees to a safe harbor when police arrive, quite possibly awaiting the opportunity to return and continue to commit acts of domestic abuse. See Crystal Cunningham, *Domestic Violence: I Don't Need To Have Bruises To Feel Pain—A Worthy Exception To The Warrant Requirement*, 28 Pac.L.J. 731, 733 (Spring 1997) ("early arrest is an appropriate response to the cyclical nature of domestic violence because it will break the chain of violence before it swings out of control possibly causing injury or death" (citing legislative findings)).

There are a number of reasons for concluding that the misdemeanor arrest authority in Section 31-1-7 is not limited to arresting only those physically at the scene of the disturbance with the police officer. First, the plain language of the statute requires only that "the *officer* is at the scene" and says nothing about the suspected abuser being at the scene. There simply is no express requirement that the abuser needs to by physically at the scene of the domestic disturbance at the same time as the police officer. So long as the officer is at the scene and can directly assess the situation, the Statute's requirement that the officer be at the scene is satisfied.

Second, although the "at the scene" language in this statute has not been interpreted in a published case, this phrase has been interpreted in another context to reasonably extend for several hours and a rational distance from the precise scene at issue. In State v. Calanche, 91 N.M. 390, 392, 574 P.2d 1018 (Ct.App. 1978), the statute at issue authorized officers to arrest without a warrant a person "at the scene" of an accident when the officer had reasonable grounds to believe the person committed a crime. The language of the statute at issue, NMSA 1953 Section 64-22-8.2, expressed the same facial indication of an arrest at the scene as the present Section 66-8-125 quoted above.

In Calanche, the evidence showed the defendant had been at the scene but he was arrested three hours later at the hospital, not at the accident scene. This arrest was lawful under the statute because "a valid warrantless arrest may be made of a person present at the scene of the accident if the arrest is made either at the scene or at a place other than the accident scene if the arrest is made with reasonable promptness." Calanche, 91 N.M. at 393. See also State v. Eden, 108 N.M. 737, 743, 779 P.2d 114 (Ct.App.), cert. denied, 108 N.M. 681, 777 P.2d 1325 (1989) ("this court has previously held that an appropriate officer may arrest a person who was present at the scene of an

accident, even though that person has left the scene, so long as the arrest takes place within a reasonable period of time after the accident. *See State v. Calanche*."). This reasoning is persuasive and should be applied with equal force to the "at the scene" language in Section 31-1-7(A). That statute should thus be interpreted to permit arrest at a place other than the immediate scene of the domestic disturbance if the arrest occurs with reasonable promptness.

A third reason to read the "at the scene" language in Section 31-1-7(A) in this manner is that such a reading is consistent with the misdemeanor arrest authority found in the FVPA. The FVPA arrest restriction is broader, imposing the requirement that the officer take steps, including arrest, when "reasonably necessary to protect the victim from further domestic abuse." NMSA 1978, Section 40-13-7(B) (1995). There is no time or place restriction stated in the FVPA arrest authority beyond the requirement that the arrest be reasonably necessary to protect the victim.

If both the FVPA and Section 31-1-7 are read consistently and harmoniously, the restriction on an officer's arrest authority where an act of domestic violence or abuse occurs should be that the arrest be reasonably necessary and reasonably prompt. See High Ridge Hinkle Joint Venture v. City of Albuquerque, 126 N.M. 413, 415, 970 P.2d 599 (1998) (provisions in statutes should be read together as harmoniously as possible). No precise geographic or temporal bright lines can be drawn and the lawfulness of any particular arrest depends on how closely it adheres to the reasonableness requirement. If officers arrest a domestic abuser across town well after the event and do so not to protect the victim but because the victim has informed them the abuser is carrying a substantial quantity of drugs and cash, a district court can correctly conclude the arrest fails the requirement that it be reasonably necessary to protect the victim. See State v. Miller, 1997-NMCA-060, ¶5, 123 N.M. 507, cert. denied, 123 N.M. 257, 939 P.2d 1065 (1997) (upholding suppression of the drugs and cash when the officer admitted that "but for the drugs and money, the police officer would not have sought Defendant").

In contrast, if both the arrest is within a reasonable time period under the circumstances and if the arrest is supported by a record that shows it was "reasonably necessary" to protect the victim, the arrest appears to be fully authorized by both Section 31-1-7(A) and the FVPA.1

Your letter also inquired about any impact on this issue from the Crimes Against Household Members Act (CAHMA), NMSA 1978, Section 30-3-10 through 30-3-16 (amended through 2001). In short, because the CAHMA has no misdemeanor arrest provision, the arrest authority found in Section 31-1-7(A) and the FVPA should be unaffected by the CAHMA. The authority to arrest for CAHMA misdemeanors, such as battery and assault against a household member, exists to the extent these crimes also fall within the parameters of Section 31-1-7(A) or the FVPA.

The most notable difference between the coverage of both Section 31-1-7(A) and the FVPA and the coverage of the CAHMA is that the CAHMA has been construed to

exclude minor children of the person committing a CAHMA crime. See State v. Stein, 1999-NMCA-065, ¶19, 127 N.M. 362. However, if a crime covered by the CAHMA is also within the FVPA list of "domestic abuse" crimes in Section 40-13-2(C), the FVPA arrest authority should still apply. Moreover, Section 31-1-7(A) provides arrest authority where there is probable cause to believe the arrestee committed assault or battery upon a household member, where "household member" includes a child. The arrest authority in Section 31-1-7(A) appears to encompass all of the CAHMA crimes.

Your inquiry also asks about civil liability. Under the misdemeanor arrest provisions of these statutes, officers have protection from civil liability for the exercise of their misdemeanor arrest authority. See NMSA 1978, Section 31-1-7(B) (1995) ("No peace officer shall be held criminally or civilly liable for making an arrest pursuant to this section, provided he acts in good faith and without malice"); NMSA 1978, Section 40-13-7(D) (1995) ("Any law enforcement officer responding to the request for assistance under the Family Violence Protection Act is immune from civil liability to the extent allowed by law"). While these statutes provide protection from civil liability for *exercising* the arrest authority found in the statutes, neither statute addresses civil liability for the consequences arising from *failure* to make an arrest. To the extent the statutes address civil liability, they favor exercising the arrest authority over declining to exercise it.

In summary, police officers have statutory authority to arrest for the misdemeanors identified in Section 31-1-7(A) (which covers the CAHMA misdemeanors) and those identified in the FVPA. That arrest authority should be interpreted to extend to an arrest that is "reasonably prompt" and "reasonably necessary to protect the victim." While bright lines defining reasonableness cannot be drawn, the arrest authority should be rationally interpreted to extend beyond the immediate scene of domestic violence. The arrest authority in these statutes should be read to extend to a reasonable passage of time and geographic distance from the scene of a domestic disturbance.

The FVPA embodies strong public policy when it requires officers to take steps to protect the victim of domestic violence, including arrest of the abuser when appropriate. The "at the scene" language in the misdemeanor arrest statute should not be read to contradict this public policy. Although a legislative change to make the law even clearer would be helpful, the arrest authority as provided in current law should be limited only by what is reasonable under the circumstances and not by any requirement that the abuser be found directly at the scene of the domestic violence.

[1] This conclusion should not be affected by the recent opinion of the New Mexico Court of Appeals in State v. Rodarte, -NMCA- , N.M. (October 24, 2005), which holds that an arrest for a nonjailable offense requires circumstances justifying the arrest in order to satisfy the constitutional requirement that an arrest be reasonable. Among the circumstances that would make arrest for a nonjailable offense reasonable, the Court discussed a defendant's violent or confrontational conduct. Rodarte, -NMCA- , ¶16. Misdemeanor crimes under the FVPA are jailable and often involve violence or confrontational conduct. See NMSA 1978, Section 31-19-1 (1984) (imprisonment for petty misdemeanor is up to six months and for misdemeanor is any term less than one

year). In addition to Rodarte appearing to not limit misdemeanor arrest authority in the domestic violence context, this office expects to file a petition for writ of certiorari seeking review of Rodarte by the New Mexico Supreme Court.