



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>July 22, 2016</p>	<p>No. I16-008 (R16-006)</p> <p>Re: Limitations on Constables Rights to Carry Firearms</p>
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To: M. Lando Voyles
Pinal County Attorney

Questions Presented

1. Is Ariz. Att’y Gen. Op. I95-009 still applicable in light of subsequent changes to the statutes A.R.S. §§ 1-215(27) and 13-105(29), both of which now include constable in the definition of “peace officer”?
2. Do the subsequent statutory changes affect the prior conclusion that constables are not primary law enforcement officers and do not benefit from A.R.S. § 38-1113 exceptions, which allow peace officers to carry firearms, when not exercising their official duties?

Summary Answer

1. No. The opinion is no longer applicable for its primary conclusion that constables must be certified by the Arizona Peace Officer Standards and Training Board (AZ POST) in order to exercise the authority or perform the duties of a peace officer, given the statutory

changes explicitly granting constables the authority of a peace officer, without the need for board certification, during the performance of official duties.

2. No. The “prior conclusion” this question references is that expressed in Ariz. Att’y Gen. Op. I87-167, which articulated that constables are not primary law enforcement officers and “have no duty to engage in regular law enforcement activities,” except insofar as their “status as peace officers compels them to act in immediate situations or while in the furtherance of primary duties.” The statutory basis for this prior opinion has not changed.

The crux of these two questions is an inquiry into whether current law permits constables to carry firearms outside the context of their official duties. There are no exceptions allowing constables to carry firearms as peace officers outside the context of their official duties. Because constables are not considered primary law enforcement, these official duties are largely limited to their on-duty employment. However, in certain off-duty situations where there is an obvious and immediate threat, a constable can respond to the threat under official duty. This would allow peace-officer privileges, including the broader firearm carry rights under A.R.S. § 38-1113, to extend to constables in these very limited situations. Importantly, nothing in this opinion impacts constables’ general Second Amendment rights as citizens to carry firearms consistent with state law when they are not carrying out official duties.

Background

Since at least the 1960s, constables have been included in the definition of “peace officer” found in A.R.S. § 1-215 (“In the statutes and laws of the state, unless the context otherwise requires: . . . (27) ‘Peace Officers’ means . . . constables . . .”).

In Ariz. Att’y Gen. Op I84-167, the Attorney General considered, “What is the duty of a constable to engage in law enforcement activity within his precinct?” *Id.* In addressing that

question, the opinion cited portions of the Arizona Constitution (Article XXII, § 17) and various Arizona statutes (A.R.S. §§ 1-201, 1-215, 9-901, 11-403, 11-441, 11-442, 11-444, 11-445, 22-102, 22-131, 38-843, and 38-1001), the relevant portions of which are essentially the same today as they were in 1984. The opinion concluded,

Clearly, a constable may be required to preserve the peace, make arrests and perform other duties of a peace officer. *See* Ariz. Att’y Gen. Op. I63-8. In our opinion, however, these are not the primary duties of a constable. In view of the legislation that has been discussed, the primary responsibility of law enforcement within the precinct falls upon the Sheriff, the town marshall or the police. Therefore, a constable has no duty to engage in regular law enforcement activities such as patrolling within his precinct, except insofar as his status as a “peace officer” compels him to act in immediate situations or while in the furtherance of his primary duties of attending the courts of justices of the peace and executing process within the county.

Id. A decade later, the Attorney General reviewed that opinion in light of the 1990 amendments to A.R.S. § 41-1823, which required most individuals to become AZ POST certified before they could exercise the powers of a peace officer. A.R.S. § 41-1823 (2008). The subsequent opinion concluded, “[W]e modify Ariz. Att’y Gen. Op I84-167 to provide that constables cannot exercise the authority or perform any duties of a peace officer without first being properly certified” by AZ POST. Ariz. Att’y Gen. Op. I95-009.

In 2007, the Arizona Legislature enacted A.R.S. § 38-1102 concerning the rights of peace officers to carry weapons. The statute was modified a few times and renumbered to § 38-1113. § 38-1113, currently reads in relevant part,

(A) Notwithstanding any other law and except as provided pursuant to subsection C of this section, a peace officer shall not be prohibited from carrying a firearm if the peace officer is in compliance with the firearm requirements prescribed by the Arizona peace officer standards and training board.

(G) For the purposes of this section: (2) “Peace officer” has the same meaning prescribed in section 1-215

A.R.S. § 38-1113(A)–(G) (2015).

In 2008, the Arizona Legislature amended three relevant statutes. First, it amended § 13-105 to explicitly include constables in the definition of peace officer for Title 13. The statute now reads in relevant part, “In this title, unless the context otherwise requires: (25) ‘Peace officer’ means any person vested by law with a duty to maintain public order and make arrests *and includes a constable.*” A.R.S. § 13-105 (2015) (emphasis added).

Second, it amended § 22-131 to explicitly limit the authority of a constable. The statute now reads, in relevant part, “A constable who is duly elected or who is appointed by the board of supervisors has the authority of a peace officer only in the performance of the constable’s official duties.” A.R.S. § 22-131(E) (2014).

Third, it amended § 41-1823 to eliminate the AZ POST certification requirement for constables. The statute now reads in relevant part: “Except. . . . persons given the authority of a peace officer pursuant to §§ 8-205, 11-572, 12-253, 13-916 *or 22-131*, no person may exercise the authority or perform the duties of a peace officer unless he is certified by the board” A.R.S. § 41-1823(B) (2008) (emphasis added).

Analysis

1. The conclusion expressed in Ariz. Att’y Gen. Op I95-009, that constables require AZ POST certification in order to exercise the authority or perform the duties of a peace officer, is no longer valid because of the 2008 statutory amendments described above. A.R.S. § 41-1823(B) created an exception to the AZ POST certification requirement for persons with the authority of a peace officer pursuant to § 22-131. *Id.* A.R.S. § 22-131(E) granted constables the authority of peace officers. A.R.S. § 22-131(E) (2014). Therefore, constables no longer require AZ POST certification to act as peace officers.

However, constables (and all other peace officers) still do require AZ POST certification in order to carry a weapon pursuant to § 38-1113 in places and at times where otherwise prohibited by law. A.R.S. § 38-1113(A) (2015).

2. The statutory basis for the Ariz. Att’y Gen. Op I84-167 has not changed since its issuance. As such, that prior opinion’s general conclusion likewise has not changed. As noted above, however, the crux of the entire opinion request is whether constables may now carry firearms as peace officers outside the context of their official duties.

The Arizona Legislature in 2007 enacted legislation (now A.R.S. § 38-1113) to grant AZ POST certified peace officers the right to carry firearms where others are prohibited from doing so. The 2008 amendment to § 22-131(E), restricting constables’ peace-officer authority to their official duties, appears to complicate the 2007 legislation’s apparent purpose.

§ 38-1113(A) reads,

A. Notwithstanding any other law and except as provided pursuant to subsection C of this section, a peace officer shall not be prohibited from carrying a firearm if the peace officer is in compliance with the firearm requirements prescribed by the Arizona peace officer standards and training board.

Id. A.R.S. § 38-1113(G) incorporates the definition of peace officer from § 1-215(23), which reads simply, “Peace officers means constables. . . .” *Id.* at § 38-1113(G).

This would seem to grant a constable who has passed AZ POST training the right to carry a firearm as a peace officer where citizens are generally prohibited from doing so. The statute grants this right to peace officers only, and pursuant to § 22-131, constables only have the authority of peace officers in the performance of official duties. The language of § 22-131 appears to limit constable rights as peace officers, and case law suggests that the rights and authority of any peace officer extend only when that individual is acting under an official duty.

Specifically, § 22-131(E) states “A constable . . . has the authority of a peace officer only in the performance of the constable’s official duties.”

The general limitation of peace officer rights and authority to the performance of official duties is demonstrated in *State v. Fontes*, 195 Ariz. 229, 232 (Ariz. Ct. App. 1998). In that case, a defendant assaulted a sheriff’s deputy who was moonlighting as a plainclothes security guard. *Id.* at 230-31. The defendant was convicted under §13-2508 of “aggravated assault on a peace officer or resisting arrest” even though the deputy was off-duty. *Id.* Defendant appealed, arguing that he could not be convicted under this statute because the officer was not “engaged in the execution of any official duties” or “acting under color of . . . official authority” and therefore was not acting as a peace officer at the time. *Id.* The Court of Appeals upheld the conviction, reasoning that “a sheriff’s deputy has a duty to preserve the peace and ‘arrest all persons who attempt to commit or who have committed a public offense . . . even when the officer is ‘off-duty.’” *Id.*; see also *State v. Kurtz*, 78 Ariz. 215, 219 (Ariz. 1954) (whether an off-duty deputy is acting as a peace officer depends on whether the deputy was “acting in vindication of public right and justice” or “merely performing acts of private service to [his] employer”).

The court explored the extensive nature of rights and privileges extended to law enforcement officers in *Lane v. Indus. Comm’n*, 218 Ariz. 44, 51 (Ariz. Ct. App. 2008). In that case, a police officer was injured by gunfire while mountain biking with his friends. *Id.* at 46. The officer was found ineligible for workers’ compensation because the gunfire was random, not directed at his group, and therefore not arising out of his employment as a police officer. *Id.* at 47. The officer appealed, arguing that “the relevant code of conduct for his employment required him to ‘act in an official capacity if [he] observe[d] an incident requiring police action,” and that his status as a peace officer exposed him to an increased risk of gunfire. The Court of

Appeals reversed based on these arguments, finding that the officer's injuries did arise out of his employment. *Id.* at 51; *cf. Eubank v. Sayad*, 669 S.W.2d 556, 568 (Mo. Ct. App. 1984) (upholding disciplinary measures against a police officer for drunken off-duty altercation because “[i]n a very real sense a police officer is never truly off-duty”).

The way in which courts consistently view the status of “peace officer” indicates that the rights, privileges and authority of a peace officer attach only if an officer is acting under his official duties. While case law also seems to suggest that the rights and privileges of peace officers attach at all times, that is only because the official duties of law enforcement officers like sheriffs extend beyond their primary, paid employment. Even when they are off-duty, sheriffs have proactive official duties to preserve the peace and arrest those violating the law that can extend to almost any situation, even a casual walk through a neighborhood or a trip to the grocery store. The duties of constables, however, do not extend so far. As Ariz. Att’y Gen. Op I84-167 makes clear, constables do not have duties co-extensive with sheriffs and are not “primary law enforcement officers.”

The statutes defining peace officer and constable also require a limited view of a constable's rights as a peace officer. A.R.S. § 38-1113 incorporates the definition of peace officer in § 1-215(23) and grants constables the authority of peace officers without reference to the issue of on- and off-duty status. A.R.S. § 1-215(23)'s silence on the issue is reconcilable with the on-duty limitation of § 22-131(E). However, the language of § 22-131(E) is irreconcilable with an interpretation of § 1-215(23) that constables are always peace officers, and that they have the authority of peace officers in typical off duty situations. The Arizona Legislature chose to enact the final clause of that statute limiting peace officer status (“only in the performance of the constable's official duties”) and it cannot be ignored. While relevant case

law suggests § 22-131(E) does not add any restrictions particular to constables, it still serves to stress the limited peace-officer authority of constables. Because constables do not have “law enforcement” duties that extend beyond the particulars of their on-duty work, their peace-officer rights generally do not extend to off-duty situations.

Still, the “peace officer” designation may assign some additional duties, rights, and privileges to constables acting off duty. As Ariz. Att’y Gen. Op I84-167 concludes “a constable has no duty to engage in regular law enforcement activities such as patrolling within his precinct, except insofar as his status as a ‘peace officer’ compels him to act in immediate situations or while in the furtherance of his primary duties of attending the courts of justices of the peace and executing process within the county.” Ariz. Att’y Gen. Op. I84-167. This suggests that the “peace officer” status could allow constables to act in immediate situations with full peace officer authority, even when off duty. If there is an apparent, immediate threat, an AZ POST certified constable could carry a firearm under A.R.S. § 38-1113, even if he otherwise would be unable to as a citizen. Without further legislation to guide on the matter, however, this off-duty right is extremely limited. While it may include a constable taking a firearm into a gun-free business when seeing an armed robbery underway, it would not include a constable taking a firearm into a gun-free restaurant out of a general fear that someone might attack him or his family.

Conclusion

The 2008 statutory changes to §§ 22-131 and 41-1823(B) explicitly granted constables the authority of a peace officer, during the performance of official duties, without the need for AZ POST certification. These statutory changes rendered Ariz. Att’y Gen. Op. I95-009 not applicable with respect to its primary conclusion. But the statutory basis for Ariz. Att’y Gen.

Op. I84-167 (concluding that constables are not primarily law-enforcement officers) has not changed, and that opinion need not be discarded to answer the questions posed here. Because the official duties of a constable are limited to on-duty work, off-duty constables, even if certified by AZ POST, only have the right to carry a firearm where doing so is otherwise prohibited by law in situations when an obvious and immediate threat presents itself. An AZ POST certified, on-duty constable, however, has the right to carry a firearm in times and at places otherwise prohibited by law, pursuant to A.R.S. § 38-1113.

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