



HENRY McMASTER
ATTORNEY GENERAL

January 22, 2009

Michael D. Owens, Investigator/General Counsel
Pickens County Sheriff's Office
216 L.E.C. Road
Pickens, South Carolina 29671

Dear Investigator Owens:

In a letter to this office you referenced various hypotheticals and questioned whether in each situation the individual could be charged with resisting arrest. You indicated that in each situation, there is the presumption of a lawful basis for the arrest.

As to the offense of resisting arrest, S.C. Code Ann. § 16-9-320 states that

(A) [i]t is unlawful for a person knowingly and wilfully to oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process or to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not. A person who violates the provisions of this subsection is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars nor more than one thousand dollars or imprisoned not more than one year, or both.

(B) It is unlawful for a person to knowingly and wilfully assault, beat, or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not. A person who violates the provisions of this subsection is guilty of a felony and, upon conviction, must be fined not less than one thousand dollars nor more than ten thousand dollars or imprisoned not more than ten years, or both.

As can be seen, a distinction is made between merely resisting arrest, which is a misdemeanor offense, and "assaulting, beating or wounding an officer" while resisting arrest which is a felony.

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As explained in McAninch and Fairey, *THE CRIMINAL LAW OF SOUTH CAROLINA* (3d ed. 1996) at pp. 431-432, “[t]he Code makes a distinction in penalty...between the use and non-use of force against an officer in resisting or interfering.”

In *State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (Ct.App. 2001), as set forth by the Court of Appeals, when the officer attempted to place the defendant under arrest, the defendant

...resisted verbally and physically. He continued to resist after...(another officer)...arrived despite the officers’ use of pepper spray, holding his arms stiff to prevent the officers from handcuffing him. He was not handcuffed until additional officers arrived to assist in holding his hands behind his back.

347 S.C. at 163. The Court found that the defendant was properly charged under Section 16-9-320(A).

The State Court of Appeals in *State v. Garvin*, 341 S.C. 122, 533 S.E.2d 591 (Ct.App. 2000) dealt with a situation where an officer tried to escort a defendant out of a courtroom who had become hostile and verbally abusive. Another officer trying to assist was struck in the face. Both officers received injuries and required hospital treatment. The defendant was convicted of a violation of Section 16-9-320(B) and the Court upheld the conviction on a directed verdict motion. See also: *Stevenson v. State*, 335 S.C. 193, 516 S.E.2d 434 (1999) (offense of resisting arrest under Section 16-9-320(B) requires proof that a person knowingly and wilfully assaulted, beat or wounded a law enforcement officer during an arrest when the person resisting knew or should have known the officer was a law enforcement officer).

In *State v. Dowd*, 306 S.C. 268, 411 S.E.2d 428 (1991), the Supreme Court determined that a defendant may be found guilty of resisting arrest based upon conduct postdating his being taken into custody. The Court agreed with the reasoning in *State v. Leak*, 181 S.E.2d 224 (N.C. 1971) which stated that

[a]n arrest does not necessarily terminate the instant a person is taken into custody; arrest also includes “bringing the person personally within the custody and control of the law.” The arrest of the defendant in the instant case did not terminate until he was delivered to the jail and properly confined.

306 S.C. at 269.

The situations referenced by you basically fall into two categories: one where the suspects do not comply, including those who have to be physically grabbed, turned around or forced into complying, but where the suspects allow themselves to be handcuffed and taken to jail after being advised they are under arrest. Such would be a violation of Section 16-9-320(A). The other

scenarios involve suspects who punch, kick or physically react to the arresting officer. Such would be a violation of Section 16-9-320(B).

In the first scenario, the suspect is advised he is under arrest but verbally responds that he is “not going to jail.” The deputy pulls out a Taser and threatens to use it unless the suspect places his hands behind his back. In that situation, the suspect complies and is handcuffed.

In another situation, the suspect is advised he is under arrest but verbally responds that he is “not going to jail.” The officer calls for another unit and after the other officer arrives, the suspect is compliant and is handcuffed.

In your third situation, the suspect is advised that he is under arrest but verbally responds that he is “not going to jail.” The officer pulls out his Taser, again advises the suspect to place his hands behind his back but the suspect refuses. The suspect is then “tased” and is then compliant with the demands by the officer.

In your fourth scenario, the suspect is advised that he is under arrest and is told to turn around and place his hands behind his back. The suspect instead turns and begins running away. The officer chases the suspect and grabs him. The suspect then allows himself to be handcuffed.

In the fifth set of circumstances, the suspect is advised that he is under arrest and when told to turn around and place his hands behind his back, the suspect raises his hands into a “fighting stance.” It is my understanding that no blows are exchanged. The officer then moves in and grabs the suspect’s arms, forcing them behind his back. The suspect then allows himself to be handcuffed.

In your sixth scenario, the facts are the same as the fifth set of circumstances except that the suspect does not submit after his arms are placed behind his back. The officer then is required to take the suspect to the ground in order to handcuff the suspect.

In your eighth situation, the suspect is advised that he is under arrest. The officer steps toward the suspect and places his hand on the suspect’s arm in preparation to handcuff the suspect. At that point, the suspect “jerks his arm away” which causes the officer to “forcefully seize the suspect, turn him, and handcuff him.”

In the ninth scenario, the suspect is handcuffed without incident, placed in the back of the patrol car and transported to jail. Upon arrival, the suspect refuses to get out of the car which requires the officer to physically pull the suspect from the car and “drag” the suspect into the facility and then to a cell.

In the opinion of this office, such factual circumstances in these various scenarios would constitute a violation of Section 16-9-320(A) since there is no physical resistance constituting assaulting, beating, or wounding of the officer.

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In your seventh situation, the suspect does not submit after his arms are placed behind his back and the officer is required to take the suspect to the ground. While taking the suspect down, he kicks the officer in the inner thigh but causes no injury to the officer.

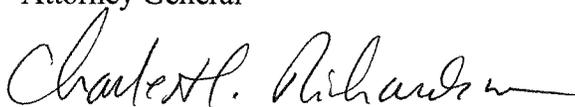
In your tenth scenario, the suspect is advised by the officer that he is under arrest, to turn around and place his hands behind his back. The suspect refuses the command and the officer grabs the suspect. A physical altercation occurs in which the suspect punches the officer in the nose, breaking the nose, with such injury requiring medical treatment. The suspect is then handcuffed and taken to jail.

In the opinion of this office, these last two scenarios would constitute a violation of Section 16-9-320(B) since there are circumstances which would qualify as an assault, beating or wounding of an officer.

If there are any questions, please advise.

Very truly yours,

Henry McMaster
Attorney General



By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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