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Citizens Arrest In South Carolina: Shield or Sword?

I. INTRO.

Citizens arrest! Citizens arrest!.. For fans of the Andy Griffith Show, the term probably brings to mind the classic scene of the lovable Gomer Pile calling out Barney Fife, the town deputy, and placing him under "citizens arrest" for an illegal u-turn. For everyone else, any familiarity that exists with the term at all probably conjures up a vague notion that rarely makes its way into daily conversation or the nightly news.

That is.. until this year. The killing of Ahmahd Aubery in neighboring Georgia, and the controversy surrounding the citizens arrest which reportedly was being attempted at the time of his death, sparked conversations among citizens groups and legal communities regarding the necessity or wisdom of maintaining the doctrine. Opponents rely on the fact that real-life does not often play out like it does in fictional Mayberry, and they claim that the doctrine encourages vigilantism that may disproportionately affect minority communities. Supporters point to the fact law enforcement, no matter how well trained or how well funded, can not be at all places at all times and that someone who is witness to a crime (perhaps also the victim of the crime) should not be compelled to stand by and allow the perpetrator to evade justice simply because the witness is not employed by a state agency.

The controversy provides an opportunity to examine the law of citizens arrest in South Carolina and answer the question: Is the law a protective shield for those who aid in the administration of justice, or a sword to be wielded by those who desire to commit what would otherwise be an unlawful battery?

II. BRIEF BACKGROUND

South Carolina first enacted a citizens arrest statute back in 1866 and the current statute was last modified in 1962[1]. The timing of the legislative action in each instance, post-war reconstruction and early civil rights movement, has caused some observers to conclude that the entire concept was one conceived out of racial animus. Though you can never detach laws from the people and time in which they were created, especially when considering race during these respective periods, the general concept of granting non-law enforcement officers the authority to make arrests actually pre-dates the settlement of America.

Though it is easy to assume that police forces of the same type that are ubiquitous in modern life have always been present, the reality is that community reliance on modern-style policing did not begin to become prevalent until the rise of urbanization that took place in the early-mid 1800s[2]. The first publicly funded, organized police force with officers on duty full-time was created in Boston in 1838. The City of New York followed soon after. Prior to that, law enforcement was largely an endeavor undertaken by part-time officials such as sheriffs or constables with the aid of either paid or volunteer private citizens. Prior to that, in colonial and early America, many communities were patrolled by "Night-watchmen", which in some instances was a compulsory service[3]. This system not only permitted the involvement of everyday citizens, but in fact relied upon it.

In fact, such practices arose under the British common law. Back in 1285 the Statute of Winchester not only gave citizens the right to arrest those who had committed crimes, but **required** it whenever the "hue and cry" was raised[4]. This principle traveled to the American colonies and as the common law developed, American Courts began to reduce the obligation to make an arrest to that of a right.

Overtime, the right became one which contained numerous subtle distinctions and nuances. For example, there were distinctions between the rights afforded a non-citizen making arrest and a government official, as well as when the suspect is an accused felon vs. a non felony, as well as the level of force that could be used. There was even law that addressed what happened when the arrest resulted in the death of a suspect. In 1833 the Court of Appeals of Law and Equity of South Carolina noted in State v. Anderson[5] that:

> "private persons have a right to arrest on suspicion that a felony has been committed" but also that a "party had no right, either to break the doors or to kill—and if they have transcended their power, and in consequence, one is killed, it is only manslaughter"

Eventually, the states began to codify the common law, in varying forms. Today, the law in South Carolina is governed almost entirely by statute.

III. SOUTH CAROLINA'S CURRENT CITIZENS ARREST STATUTE

Our State's statutory scheme relating to arrest authority is contained in Article 17 Chapter 13 of the South Carolina Code and contains many of the themes which originated in the common law:

> §17-13-10 Circumstances when any person may arrest a felon or thief.
> "Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law."
>
> § 17-13-20. Additional circumstances when citizens may arrest; means to be used.
> A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person:
>
> (a) has committed a felony;
>
> (b) has entered a dwelling house without express or implied permission;
>
> (c) has broken or is breaking into an outhouse with a view to plunder;
>
> (d) has in his possession stolen property; or
>
> (e) being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed

As you can see, the 17-3-10 draws distinctions between felonies vs. non-felonies, crimes committed within view vs. not personally witnessed, and crimes involving theft of property. This is consistent with a lot of states which essentially limit the arrest authority to situations in which a felony is committed in the citizens presence, or a non-felony committed in their presence if it involves theft of property[6]. The public policy considerations are understandable. Society has an interest in preventing perpetrators of serious offenses (i.e murder, robbery, etc..), from evading justice and if they escape the scene of the crime the more likely that is to happen. Society also has an interest in protecting citizens' private property. This especially true in situations involving public commerce such as shopkeepers and merchants. These provisions are consistent with the common law and are, at least arguably, narrowly tailored to address the legitimate public policy aims.

Section 17-3-20, however, appears to greatly expand the limited scope of 17-3-10. The statute expressly grants the citizen the right to use deadly force if the arrest occurs during nighttime, but does not expressly retain the requirement that the citizen be witness to any felony or property crime. This particular

provision seems to expand the common law right, as expressed in Anderson, and presents perhaps the strongest argument that the statute has potential for tragic abuses.

As a comparison, in Georgia where the Aubery killing occurred, that state's citizens arrest statute gives no express authority to use deadly force at all, much less when the crime did not occur in the citizens presence, even though it does not contain a limitation on the types of crimes which are subject to a citizens arrest.

> § 17-4-60. Arrest by private person
> A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.

IV. APPLICATIOIN OF CITIZENS ARREST IN SC

Given the rights conveyed in the statute, and the controversy surrounding the events in Georgia, an examination of how this statute has actually been applied in our state is warranted. Perhaps surprisingly, however, much of the case law reflects a "caveat arrestor" public policy whereby an improper citizens arrest could expose the arrestor to potential criminal and civil liability, or require a conviction to be vacated.

The 1901 case of State v. Wittle[7] is early example. In Wittle, Johnson was on the run from the state of Georgia, having escaped after injuring a guard. The Defendant was a duly deputized sheriff in Saluda County and he received word that Johnson was hiding out in neighboring Lexington County, where he had no additional authority. Wittle, together with other Saluda deputies found Johnson at a home in Lexington County. Though there was initially no incident, once Wittle began to handcuff Johnson, he resisted. At that time Johnson's mom and sister began to interfere with the arrest, at one point striking Wittle with a hammer. In the course of the altercation, Wittle shot and killed Johnson. Despite being a sheriff in neighboring Saluda County, and despite the fact that Johnson's status as an escaped convict did not appear to be contested, Wittle was tried and convicted of manslaughter. The Supreme Court upheld the decision.

In the 1991 case of State v. Nall[8], a trial conviction was overturned on the grounds that the citizens arrest was not proper. In that case a homeowner, responding to an automobile break-in identified two individuals in the vicinity where the crime(s) occurred and attempted to detain them until the police arrived at which time the Nalls fought back and caused injuries to the homeowner before escaping. These injuries were the basis for charges of assault and battery. The Court reversed the conviction on the grounds that 1) the homeowner made the arrest based on information provided by his daughter, and which was not personally known to him and 2) the fact that the crime for which the homeowner was attempting to justify the arrest was not a felony.

In Thomas v. Colonial Stores Inc[9]. a store owner faced a civil lawsuit arising out of the arrest of an alleged shoplifter. The Court in that case ruled that a civil action for wrongful arrest could proceed even if the initial arrest was supported by sufficient probable cause. The Court ruled that if a citizen making an arrest causes an unreasonable delay in transporting the suspect to the magistrate, pursuant to the statute, the arrest will still be lawful, but the citizen will still be liable for that portion of the arrest that resulted from the unreasonable delay.

Even though these decisions may have acted as caution to would-be vigilantes, the Court also chose not to substantially curtail the validity of the statute, even the section authorizing use of deadly force. In 1985 when the US Supreme Court decided in Tennessee v. Garner[10], that using deadly force upon a fleeing suspect that posed no immediate harm violated the Fourth Amendment, the SC Supreme Court declined to use that ruling to invalidate all or even part of the citizen's arrest statute. In contrast, in State v. Cooney[11], the Court distinguished between actions taken by government actors and those by private citizens. In essence, giving private citizens more leeway in using deadly force than that of a police officer.

The policy in favor of the statute can be found in the case law which a proper citizens arrest was found to occur. In Burton v. Mcneil[12], for example, evidence showed that defendant's vacant house had twice been set on fire, and after being informed of a disturbance in the house defendant and his son found two parties inside the property. The trespass coupled with the felonious arsons which had previously occurred was

determined to be sufficient cause to justify the arrest. This obviously reflects a desire by the Court to give property owners the leeway to prevent future victimization and loss of property. Such considerations are often cited by supporters of the law as justification for the continued need for the statute.

V. FINAL ANALYSIS

Notwithstanding the law which has been cited, there exists considerable difficulty in assessing the statute's application through the historical record. This is because any abuse of the statute, at least in the criminal context, would result from a lack of prosecution. In such a scenario, there would obviously be no appellate decision to review. Essentially, all we have to review are the cases in which the State decided the statutes protections did not apply, as well as a handful of civil cases. Though the cases that we have reflect a cautionary judicial viewpoint of the statute when applied in real life, we simply cant know how often justice how not been served as a result of the statute's existence.

However, what we can tell is that the statute as written does comport with longstanding common law principles, with the exception of the legal force provision. Though some argue for the statute's complete abolition it is clear that there exists some justifications for recognizing a citizens arrest such a protection of property, administration of justice, etc...The problem is that the lethal force provision appears to go beyond what was even part of the common law, and with the Supreme Court's ruling in Garner gives more authority to non-officers. Readers should not conflate the use of deadly force in making a citizens arrest, with self defense provisions of the stand your ground act. Some opponents of the citizens arrest statute use these two laws to illustrate the different scenarios and to justify, in their view, the need to abolish the former while maintaining the latter[13].

Though there doesn't appear to be a large amount of cases in which killings have been excused under the statute, the Aubery killing in Georgia serves as a warning of possible unintended scenarios in which the statute could be applied. This is especially true in light of the differing language between the statutes of the two states. As proposed legislation makes its way through the state house, legislators will have to evaluate these issues and if the statute is modified it will be done in a way that preserves the protections necessary for property owners, while at the same time no encouraging or protecting vigilantes.

[1]S.C. Code §17-13-10

[2]See "How The US Got its Police Force". Olivia B. Waxman. Time Magazine. May 18, 2017.

[3]Gaines, Larry K.; Kappeler, Victor E. (June 4, 2011). *Policing in America*. *Google Books*. ISBN 9781437734959.

[4]Statute of Winchester 1285, 13 Edw. 1c. 1-6 91285), reprinted in SELECT DOCUMENTS OF ENGLISH CONSTUTIONAL HISTORY 76-79 (George Burton Adams & H. Morse Stephens eds. 1901). See also Dooms of Canute, c. 29 (1020): "And if anyone encounters a thief and wilfully lets him go without making outcry, he shall pay the theif's wergeld as compensation, or shall clear himself by a full oath, that he did not know [whom he let go] to be guilty of anything. And if any one hears the outcry and neglects it, he shall pay the king's *oferhyrnesse* or clear himself by a full oath." C. Stephenson and F. Marcham, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, 23–24 (1937).

[5]*State v.* ***Anderson,*** 19 S.C.L. (1 Hill) 327 (1833)

[6]See as example North Carolina G.S.§ 15A-404

[7]State v. Whittle (S.C. 1901) 59 S.C. 297, 37 S.E. 923.

[8]State v. Nall (S.C.App. 1991) 304 S.C. 332, 404 S.E.2d 202.

[9]Thomas v. Colonial Stores, Inc. (S.C. 1960) 236 S.C. 95, 113 S.E.2d 337.

[10]Tennessee v Garner, 471 U.S. 1, 105 S.Ct. 1694 (1986)

[11]State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597,

[12]Burton v. McNeill (S.C. 1941) 196 S.C. 250, 13 S.E.2d 10

[13]See "South Carolina Citizens Arrest Law is 154 years Old with no record of success so why drop it now". Adam Benson. Charleston Post & Courrier. May 29th 2020