

Of course, when a municipal police officer makes an arrest of a third person outside of his municipality for either felony or misdemeanor in accordance with the above-stated legal principles, he should comply with §901.23, F. S., which provides:

**901.23 Duty of officer after arrest without warrant.**—A peace officer making an arrest without a warrant shall take the arrested person without unnecessary delay before the most accessible magistrate in the same county and shall make a complaint stating the facts constituting the offense for which the person was arrested.

However, when a municipal police officer is outside of his municipality, whether on a fresh pursuit mission or not, he may make a "citizen's arrest" for a felony other than the violation of §843.01 in accordance with the common law principles stated in 6 C.J.S. *Arrest* §8b(2)(a), at pp. 606 and 607 as follows:

*At common law*, and under the statutes of most states, although subject to statutory variations, a private person acting in good faith may arrest without a warrant one who has committed a treason or a felony on an occasion already past.

*In order to justify such an arrest, it is necessary, and also sufficient, to show that a felony was actually committed, and that there was reasonable ground for suspecting that the person arrested committed it.* . . . (Emphasis supplied.)

Also, a police officer, as a private citizen and without regard to fresh pursuit, may make an arrest outside of his municipality for a misdemeanor constituting a breach of the peace committed in his presence outside of his municipal limits. We quote from 6 C.J.S. *Arrest* §8c, at p. 607 as follows:

*At common law*, and except where the rule is changed by statute, it being the duty of every *citizen* to assist in preserving the peace, any private person may arrest without a warrant one who commits *a breach of the peace in his presence*, or where it is reasonably suspected that a person is threatening to commit a breach of the peace. *Unless modified by statute, it would seem, where the arrest is for a misdemeanor, that the offense must amount to a breach of the peace to justify a private person in arresting without a warrant.* (Emphasis supplied.)

*Accord:* *Marden v. State*, 203 So.2d 638 (3 D.C.A. Fla., 1967); *certiorari denied*, 210 So.2d 224 (Fla. 1968).

AS TO QUESTION 3:

This question is answered in the affirmative.

073-60—March 14, 1973

## PAROLE AND PROBATION

### SUBSEQUENT FELONY ARREST—INCARCERATION, HEARING, REINSTATEMENT

*To: Armond R. Cross, Chairman, Florida Parole and Probation Commission,  
Tallahassee*

*Prepared by: Reeves Bowen, Assistant Attorney General*

#### QUESTIONS:

1. When a parole revocation hearing is held pursuant to §949.11, F. S., within ten days after a parolee's arrest on a felony charge, what effect

does the holding of such hearing have upon the temporary revocation of parole mandated by §949.10, F. S.?

2. When a parole revocation hearing is held within ten days, but no order revoking or restoring parole is made within ten days, may the parolee be held in custody by the sheriff, without bail, on the new charge after the expiration of such ten days if such charge is for a felony that would be bailable except for §§949.10, 949.11, and 949.12, F. S.?

3. When a parole revocation hearing is held by the Parole and Probation Commission pursuant to §947.11, F. S., with the result that the commission finds no grounds for revocation or decides not to revoke as authorized by §947.23(1), F. S., should the commission make an order reinstating the parolee to parole supervision?

#### SUMMARY:

The holding of a parole revocation hearing pursuant to §949.11, F. S., ends the sheriff's right to hold the parolee under the temporary revocation of parole effectuated by §949.10, F. S.

If the hearing should be concluded without an order revoking parole having been made, the parolee would be entitled to be released on bail to answer the new felony charge (if it charges a bailable offense), unless an arrest warrant is issued pursuant to §947.22, F. S., and served on the parolee by the sheriff who holds him in custody.

If, after holding the hearing required by §949.11, the commission finds no grounds for revocation or decides to restore the parolee to supervision as authorized by §947.23(1), F. S., the commission should make an order in accordance with said §947.23. Of course, should the commission conclude that a violation has occurred and that original order of parole should be revoked, the commission should enter an order returning said parolee to prison to serve the sentence theretofore imposed upon him.

#### AS TO QUESTION 1:

Section 949.10, F. S., provides that upon the arrest of a parolee in this state on a new felony charge, his parole shall stand temporarily revoked "*and such person shall remain in custody until a hearing* by the parole and probation commission . . . ." (Emphasis supplied.)

Section 949.11, F. S., provides that a hearing shall be held by the commission within ten days from the date of such arrest.

Section 949.12, F. S., provides that "[a] person whose parole or probation has been temporarily revoked pursuant to §949.10 *shall not be admitted to bail prior to the hearing provided for in §949.11.*" (Emphasis supplied.)

Thus it appears that §949.10 requires that the parolee remain in custody *only until a hearing is held* (within ten days); and that §949.12 impliedly recognizes the right of the parolee to make bail on the new felony charge after the conclusion of the hearing as provided for in §949.11, *i.e.*, within ten days after the arrest.

The result is that the holding of the required hearing by the commission within ten days after the arrest on the new felony charge brings an end to the sheriff's right to hold the parolee under the temporary revocation of parole. If the hearing should be concluded without an order of revocation having been made, the parolee would be entitled to be released on bail to answer the new felony charge if it should be bailable without regard to §§949.10, 949.11, and 949.12, *supra*, unless a parole and probation commissioner issues an arrest warrant pursuant to §947.22, F. S., and has it served upon the parolee by the sheriff who has him in custody.

If there is no order of revocation by the time the hearing is concluded, and if it is desirable that the matter be considered by the commission at a later date, the only way the commission can retain any hold on the parolee is through the issuance and service of an arrest warrant pursuant to §947.22.

## AS TO QUESTION 2:

The answer to question 1, *supra*, requires that question 2 be answered in the negative.

## AS TO QUESTION 3:

Section 949.11, F. S., provides that when a parole is temporarily revoked pursuant to §949.10, F. S., the parolee "shall be given a hearing pursuant to §947.23" and I think that the following provisions of said §947.23 should be followed when a hearing is held pursuant to §949.11:

Within a reasonable time thereafter the commission shall make findings upon such charge of parole violation and shall enter an order determining whether said charges of parole violation have been sustained. The commission shall in and by said order revoke said parole and return said person to prison to serve the sentence theretofore imposed upon him, or reinstate the original order of parole, or shall enter such other order as it may deem proper.

Therefore, it is my opinion that the commission should make an order reinstating the parolee to parole supervision under the circumstances recited in question 2.

073-61—March 14, 1973

## TAXATION

USE TAX LIABILITY OF PROMOTIONAL MATERIAL MAILED  
TO FLORIDA RESIDENTS FROM OUTSIDE STATE

*To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee*

*Prepared by: Winifred L. Wentworth, Assistant Attorney General and James D. Whisenand, Legal Intern*

## STATEMENT OF FACTS:

The mail advertising material is sent by a mail-order record club *without charge* through the United States mail, postage prepaid, from mailing points outside the State of Florida. There is no personal sales activity either by employees or independent sales representatives of the club in the State of Florida. The club is a division of a corporation, which is engaged in business activities in Florida, and Florida does have sufficient jurisdiction or nexus over the corporation to warrant its registration as an out-of-state dealer under Ch. 212, F. S. In fact, the corporation is and has been registered as a dealer for several years.

## QUESTION:

Is there any liability for use tax under Ch. 212, F. S., for mailing of advertising or promotional materials in the foregoing circumstances?

## SUMMARY:

Remittance of use tax pursuant to Ch. 212, F. S., is not compelled when a sender deposits advertising or promotional material in the mail out of state for delivery without charge to Florida residents and retains no effective control, possession, or ownership of the material.

The question may in my opinion be answered in the negative. According to the facts submitted, the record club is a division of a parent corporation subject to registration as a Florida out-of-state dealer under Ch. 212, F. S., and solicits by direct mail and newspaper advertising the sale of phonograph records to Florida