

OP. NO. 04-049

CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED — CRIMES INVOLVING MORALS AND DECENCY – OBSCENITY AND RELATED OFFENSES.

No statutory time limit within which magistrate must grant bond for intoxicated individual charged with misdemeanor offense, such as driving under influence or public intoxication.

The Honorable Gary W. Waters
Sheriff for the City of Portsmouth
July 15, 2004

Issue Presented

You ask whether there is a specified time within which a magistrate must grant bond for an intoxicated person charged with a misdemeanor offense, such as driving under the influence or public intoxication.

Response

It is my opinion that there is no statutory time limit within which a magistrate must grant bond for an intoxicated person charged with a misdemeanor offense, such as driving under the influence or public intoxication.

Applicable Law and Discussion

A 1983 opinion of the Attorney General addresses your question.¹ The opinion notes that the justification for detaining a person accused of driving under the influence or public intoxication² is that the accused represents a threat to his own safety or the safety of others.³ The determination as to when to release such a person must be based on a subjective evaluation of the person's condition at that time.⁴

This standard defies fixed time limits. Instead, the magistrate must hold the intoxicated person until he may be released without "unreasonable danger to himself or the public."⁵ This release must occur in a manner that protects the accused from being unreasonably held long after his condition has changed.⁶ The 1983 opinion concludes that, "[b]ecause of the limited justification for this detention, the confinement should last only until the accused can be released to the supervision of a *responsible* third person or the condition which presents a danger to the accused and others changes."⁷

Bail decisions generally are committed to the sound discretion of the appropriate judicial officer.⁸ Of course, this discretion may not be exercised arbitrarily.⁹ Even if the person is still intoxicated, the magistrate must release him to a third party only, if one is available and is deemed by the magistrate to be responsible.¹⁰

The determination as to whether a third party is "responsible" rests with the sound discretion of the magistrate.¹¹ Factors such as the age, physical characteristics, and demeanor of both the detainee and the other adult may enter into this decision. For example, a magistrate could determine, in his discretion, that release of a belligerent, intoxicated, 250-pound detainee to a meek 100-pound family member, who clearly cannot control him, is not appropriate.¹² Similarly, a magistrate might find that a sober passenger in the vehicle at the time the defendant was driving under the influence is not "responsible."¹³

I am unable to find any statute requiring a magistrate to release an individual charged with driving under the influence or public intoxication to a family member or other third party while the arrestee is still intoxicated. The magistrate must release such individual only if, in his sound discretion, he deems the third party to be responsible. Otherwise, the magistrate may order the individual held until his physical condition no longer constitutes a threat to himself or others.

Conclusion

Accordingly, it is my opinion that there is no statutory time limit within which a magistrate must grant bond for an intoxicated person charged with a misdemeanor offense, such as driving under the influence or public intoxication.

¹See 1983-1984 Op. Va. Att'y Gen. 228.

²See Va. Code Ann. §§ 18.2-266, 18.2-388 (Michie Repl. Vol. 1996) (relating to driving while intoxicated and public intoxication, respectively).

³1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229; *see also* Va. Code Ann. § 19.2-120(A)(2) (LexisNexis Repl. Vol. 2004).

⁴See 1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229; *see also* § 19.2-120(A) (providing for pretrial detention of person held in custody when there is probable cause to believe accused will flee or will pose danger to safety of community).

⁵Section 19.2-120(A)(2); *see also* 1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229. Under some circumstances, the magistrate may delegate this decision to the custodian holding the prisoner. 1983-1984 Op. Va. Att'y Gen., *supra*, at 229-30.

⁶1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229.

⁷*Id.* (emphasis added); *see also* Pulliam v. Allen, 466 U.S. 522, 526 n.2 (1984) (noting lower court's directive that any pretrial detention of persons arrested for nonjailable offenses and deemed to be danger to themselves or others must cease when condition that created danger changes or abates, or arrestee is released into third-party custody under circumstances that abate danger).

⁸Judd, No. 2 v. Commonwealth, 146 Va. 276, 277-78, 135 S.E. 713, 713-14 (1926) (per curiam) (granting of bail after conviction of felony). This discretion may be curtailed by other provisions of law. For example, effective July 1, 2004, a presumption against bail exists for any individual charged with a fourth or subsequent offense of driving under the influence committed within five years. Section 19.2-120(B)(9).

⁹"There is a presumption that public officials will discharge their duties honestly and in accordance with law, and will not arbitrarily exercise the discretion placed in their hands." *Nat'l Maritime Union v. City of Norfolk*, 202 Va. 672, 680, 119 S.E.2d 307, 313 (1961).

¹⁰See 1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229.

¹¹See, e.g., *State v. Haas*, 505 S.E.2d 311, 314 (N.C. Ct. App. 1998) (noting that under North Carolina statute, impaired driver has right to pretrial release only when magistrate determines that sober, responsible adult will assume responsibility for impaired individual).

¹²As other states have recognized, the consequences of premature release of drunk drivers can be tragic. For example, in New Jersey, a drunk driver who was released while still intoxicated drove within an hour of his release, killing himself and a recent Naval Academy graduate with whom he collided. Joseph A. Gambardello, *DWI law lets towns keep hold of drivers*, *Philadelphia Inquirer*, Aug. 28, 2003, at B01, *available at* LEXIS, News Library, Major Newspapers File; see also N.J. Stat. § 40:48-1.3(a) (LEXIS through June 7, 2004) (permitting municipalities to adopt ordinances to hold DUI arrestees in protective custody until blood-alcohol concentration is less than 0.05% or up to eight hours without hearing).

¹³In the case of an arrestee charged with public intoxication, part of the magistrate's consideration must be whether the third party can arrange to transport the arrestee so that he does not subject himself to rearrest for again appearing in public while intoxicated.

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