



COMMONWEALTH OF VIRGINIA

Office of the Attorney General

William C. Mims
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

October 26, 2009

The Honorable Dennis S. Proffitt
Chesterfield County Sheriff
P.O. Box 7
Chesterfield, Virginia 23832

Dear Sheriff Proffitt:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether § 19.2-390 requires that the sheriff make a report to the Central Criminal Records Exchange ("CCRE") when a show cause summons is served.

Response

It is my opinion that service of a criminal show cause summons does not constitute an "arrest" or trigger the reporting requirements of § 19.2-390.

Applicable Law and Discussion

Section 19.2-390 provides, in pertinent part, that:

A. 1. Every state official or agency having the power to arrest, the sheriffs of counties, the police officials of cities and towns, and any other local law-enforcement officer or conservator of the peace having the power to arrest for a felony shall make a report to the Central Criminal Records Exchange, on forms provided by it, *of any arrest*, including those arrests involving the taking into custody of, or service of process upon, any person on charges resulting from an indictment, presentment or information, the arrest on capias or warrant for failure to appear, and the service of a warrant for another jurisdiction, on any of the following charges:

- a. Treason;
- b. Any felony;
- c. Any offense punishable as a misdemeanor under Title 54.1; or
- d. Any misdemeanor punishable by confinement in jail (i) under Title 18.2 or 19.2, except an arrest for a violation of § 18.2-119, Article 2 (§ 18.2-415 et seq.) of Chapter 9 of Title 18.2, or any similar ordinance of any county, city or town, (ii) under § 20-61, or (iii) under § 16.1-253.2.

The reports shall contain such information as is required by the Exchange and shall be accompanied by fingerprints of the individual arrested. [Emphasis added.]

Section 19.2-390(A)(1) does not explicitly mention a show cause summons. Therefore, the issue is whether the service of a show cause summons qualifies as an “arrest” within the meaning of § 19.2-390.

Chapter 7 of Title 19.2, §§ 19.2-71 through 19.2-83.2, governs the procedures for arrest in the Commonwealth. Section 19.2-76 provides that “[a] *warrant or capias shall be executed by the arrest* of the accused, and a *summons shall be executed by delivering a copy* to the accused personally.” (Emphasis added.) Thus, there is a distinction between a warrant or capias and a summons. The Supreme Court of Virginia has held that an arrest involves “a person who is detained in custody by authority of law or one who is under legal restraint.”¹ Therefore, it is my opinion that for purposes of § 19.2-390, an arrest would mean that a person would be subject to physical restraint, restriction of personal freedom, or detainment for custody.

I find no statutory definition of the term “show cause summons.” When a particular word in a statute is not defined in the statute, it will be given its ordinary meaning.² A “show cause order” is “[a]n order directing a party to appear in court and explain why the party took (or failed to take) some action or why the court should or should not grant some relief. — Also termed *order to show cause; rule to show cause, show-cause rule.*”³ Further, the term “rule to show cause” means “[an] expedited proceeding on a show-cause order. — Also termed *rule to show cause[.]*”⁴ A “summons” is “[a] notice requiring a person to appear in court.”⁵ Based on these definitions, a show cause order or summons is an instrument of notice and not a charging instrument.⁶ Being an instrument of notice, the specific purpose of a show cause order or summons is to notify and command that a respondent appear before the court to answer questions stemming from a matter that is or has been already before the court.⁷ While a capias and a show cause summons both are used to bring a person before the court, the capias includes an ability to detain and seize while the show cause summons does not.⁸

¹Moore v. Commonwealth, 218 Va. 388, 394, 237 S.E.2d 187, 192 (1977) (interpreting meaning of “arrested” in context of § 19.1-163.1; noting that person whose freedom of movement and liberty is not subject to legal restriction is not person who is arrested); *see also* 1972-1973 Op. Va. Att’y Gen. 266, 267 (noting that arrest means to deprive person of liberty by legal authority; taking person into custody for purpose of holding or detaining him to answer criminal charge).

²*See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970). “[W]ords in common use must be given their plain and natural meaning in the absence of any showing that such words were used in any other than their usual and ordinary sense.” McClung v. County of Henrico, 200 Va. 870, 875, 108 S.E.2d 513, 516 (1959); *see also* Roller v. Shaver, 178 Va. 467, 472, 17 S.E.2d 419, 422 (1941) (noting that words and phrases should be given usual and ordinary meaning).

³BLACK’S LAW DICTIONARY 1207 (9th ed. 2009).

⁴*Id.* at 1505; *see also id.* at 1450 (referring to “show-cause proceeding” for definition of “rule to show cause”).

⁵*Id.* at 1574.

⁶Although a judge may, after the service of a show cause summons and disposal of the immediate matter, find contempt, it is not considered to be the charging instrument.

⁷*See supra* notes 3-5 and accompanying text. A show cause order or summons is also distinct from a capias, which is “[a]ny of various types of writs that require an officer to take a named defendant *into custody.*” BLACK’S LAW DICTIONARY, *supra* note 3, at 236 (emphasis added).

⁸*See generally* VA. CODE ANN. § 18.2-271.1(F) (2009) (providing that show cause is served by mailing to last known address); VA. CODE ANN. § 19.2-76 (2008) (providing that capias is executed by arrest of accused while summons is executed by delivering copy to accused); *see also* § 19.2-390(A)(2) (delaying requirement to report to CCRE certain violations or misdemeanors of persons arrested and released on summons issued and served in place of warrant until final outcome of charge).

The Honorable Dennis S. Proffitt
October 26, 2009
Page 3

Finally, a prior opinion of the Attorney General has concluded that where an accused has merely been served with a summons, without being detained, there has been no arrest and no requirement to make an arrest report to CCRE.⁹ Thus, service of a show cause summons is not an arrest for purposes of § 19.2-390.

Conclusion

Accordingly, it is my opinion that service of a criminal show cause summons does not constitute an “arrest” or trigger the reporting requirements of § 19.2-390.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. C. Mims', with a stylized flourish at the end.

William C. Mims

3:992; 1:941/09-070

⁹See 1975-1976 Op. Va. Att’y Gen. 13, 15 (interpreting CCRE reporting requirement in context of summons issued pursuant to § 19.2-73).