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OPINION COMMITTEE



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November 26, 2018

Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548 | Austin, TX 78711-2548
via email to opinion.committee@oag.texas.gov

RQ-0255-KP

FILE # ML-48462-18

I.D. # 48462

re: Request for opinion on "no-chase" policies

Dear General Paxton:

I write on behalf of a committee of a house of the Legislature to request a written opinion on several questions affecting the public interest.

Background

Law enforcement agencies throughout Texas have increasingly implemented "no-chase" policies, which require the peace officers they employ to refrain from pursuing offenders in situations that vary between policies. Some peace officers have expressed concern that these policies conflict with their statutory duties to prevent or suppress crime and to arrest offenders. These officers also worry that, given those duties, they might be exposed to civil liability for harm later caused by an offender they failed to chase.

Applicable Legal Standards

Duty to Arrest

A Texas peace officer shall, "in every case authorized by [statute], interfere without warrant to prevent or suppress crime" and "arrest offenders without warrant in every case where the officer is authorized by law." TEX. CODE CRIM. PROC. ANN. art. 2.13(b)(1) & (4). Chapter 14 of the Code of Criminal Procedure authorizes warrantless arrests in numerous circumstances, including every situation in which an officer is lawfully attempting to arrest or a detain someone who then flees. *See generally id.* ch. 14; *compare id.* art. 14.01(b) (authorizing warrantless arrest for offenses committed within view of officer), *with* TEX. PEN. CODE ANN. § 38.04 (evading lawful arrest or detention is offense in itself). This plain language suggests that peace officers have a statutory duty to arrest fleeing suspects, and it follows that wholly failing to give chase would be a dereliction of that duty.

On the other hand, case law suggests that these are sometimes matters of discretion. A discretionary function is one involving "personal deliberation, decision and judgment," as opposed to a ministerial duty, "which require[s] obedience to orders or the performance of a duty to which the actor has no choice." *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994). Courts at both the state and federal levels have diverged on whether the decision to arrest (and indeed, the decision to pursue) is discretionary or ministerial. *Id.* at 654-55. The trend in recent "chase cases" has been to treat the decision to pursue as an exercise of discretion. *E.g., Tex. Dep't of Pub. Safety v. Bonilla*, 481 S.W.3d 640, 642-43 (Tex. 2015)



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(determining officer's decision to chase was discretionary); *Martinez v. Harris County*, 526 S.W.3d 557, 560–61 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (same); *City of Houston v. Collins*, 515 S.W.3d 467, 472–73 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (same). Although it would seem to be the other side of the same coin, there is a dearth of clear authority on whether the decision *not* to chase is similarly discretionary, particularly in the context of an officer observing a no-chase policy.

Civil Liability

Individual peace officers may usually raise the affirmative defense of official immunity from suit when performing a discretionary function in good faith and within the scope of their authority. *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000); *Chambers*, 883 S.W.2d at 653; see also TEX. CIV. PRAC. & REM. CODE ANN. § 101.026 (noting individual immunity of government employees not waived by Texas Tort Claims Act). Assuming the decision not to chase due to a no-chase policy is legally (if not practically) discretionary, and since there is no question that arrest and pursuit are within the scope of a peace officer's authority, the question of immunity turns on good faith.

In cases where officers choose to chase, good faith is established by showing “only that a reasonably prudent officer *might* have believed that he should have continued the pursuit.” *Clark*, 38 S.W.3d at 581; accord *Chambers*, 883 S.W.2d at 656–57. This decision must be made by weighing need versus risk:

The need element refers to the “urgency of the circumstances requiring police intervention,” or “the seriousness of the crime or accident to which the officer responds, whether the officer's immediate presence is necessary to prevent injury or loss of life or to apprehend a suspect, and what alternative courses of action, if any, are available to achieve a comparable result.” The risk element of good faith refers to “the countervailing public safety concerns,” or “the nature and severity of harm that the officer's actions could cause (including injuries to bystanders as well as the possibility that an accident would prevent the officer from reaching the scene of the emergency), the likelihood that any harm would occur, and whether any risk of harm would be clear to a reasonably prudent officer.”

Clark, 38 S.W.3d at 581 (quoting *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 (Tex. 1997)). Presumably, this same analysis would be used to determine good faith in any decision *not* to chase, so bad faith would only be found if no reasonably prudent officer could have decided that the risk of pursuit outweighed the need to do so.

Yet even in a bad faith situation, causation would have to be proven as a matter of law for any liability to exist. The use (and failure to use) a motor vehicle has been held legally disconnected from harm when it does not directly cause the harm but instead “does no more than furnish the condition that makes the injury possible.” *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 541 (Tex. 2003) (quoting *Dallas County Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998)). In chase cases, this principle has been used liberally to shield officers from liability when a fleeing offender causes harm. *E.g.*, *Teague v. City of Dallas*, 344 S.W.3d 434, 439 (Tex. App.—Dallas 2011, pet. denied) (holding no governmental liability for



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harm caused by fleeing suspect where harm not directly caused by officers); *Lopez v. Escobar*, No. 04-13-00151-CV, 2013 WL 4679062, at *5 (Tex. App.—San Antonio Aug. 28, 2013, no pct.) (same); *City of Sugarland v. Ballard*, 174 S.W.3d 259, 262 (Tex. App.—Houston [1st Dist.] 2005, no pct.) (same); see also TEX. CIV. PRAC. & REM. CODE ANN. § 41.005(a) (precluding exemplary damages against defendants for harm caused by criminal act of another). The same logic should apply to a decision not to chase—perhaps even more forcefully, as a case of inaction—to break the causal chain with any harm and protect individual officers from liability.

Questions Posed

I am asking the Office of the Attorney General for an opinion on the following questions:

1. Are no-chase policies by law enforcement agencies a lawful limitation on peace officers' discretionary functions or an unlawful limitation on their ministerial duties?
2. In what circumstances might an individual peace officer face civil liability for failing to pursue an offender by observing a no-chase policy?

I appreciate your thoughtful and expeditious consideration so that the Legislature is fully informed on these issues when it meets this coming January. Please do not hesitate to contact me if I can be of any further assistance in answering this request.

Respectfully,

JOE MOODY
Chair, Committee on Criminal Jurisprudence