

**OPINION
70-148**

March 11, 1970 (OPINION)

Mr. Thomas E. Rutten
Assistant State's Attorney
Ramsey County

RE: Criminal Procedure - Arrests at Night - Warrant

This is in reply to your letter of March 5, 1970, relative to the above cited sections. You quote the sections and state the following facts and questions:

There appears to be some sort of conflict between these two statutes in as much as when under section 29-06-15 of the North Dakota Century Code, a peace officer could make an arrest without a warrant on a charge of driving while under the influence of alcoholic beverages merely upon reasonable cause. On the other hand, pursuant to section 29-06-16, a peace officer could not make an arrest for the offense of driving while under the influence of alcoholic beverages at night unless the offense was committed in his presence."

I would appreciate your opinion as to which of these two sections would be controlling in the event of an arrest made at night on the charge of driving while under the influence of alcoholic beverages. I would presume that section 29-06-15 would be controlling since this was passed by the 1967 legislature and the other section has been on the books for some time."

Section 29-06-15 of the North Dakota Century Code, as amended, provides:

ARREST WITHOUT WARRANT. A peace officer, without a warrant, may arrest a person:

1. For a public offense, committed or attempted in his presence; and for the purpose of this subsection a crime shall be deemed committed or attempted in his presence when what the officer observes through his senses reasonably indicates to him that a crime was in fact committed or attempted in his presence by the person arrested.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony in fact has been committed, and he has reasonable cause to believe the person arrested to have committed it.
4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested.
5. For such public offenses, not classified as felonies and

not committed in his presence as provided for under section 29-06-15.1.

6. On a charge, made upon reasonable cause, of driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages."

Section 29-06-16 of the North Dakota Century Code provides:

ARREST AT NIGHT - REASONABLE CAUSE. A peace officer at night may arrest a person for a public offense without a warrant, if:

1. The offense was committed or attempted in his presence; or
2. He has reasonable cause to believe that the person arrested has committed a felony, although it afterwards appears that the felony was not committed."

Subsection 6 of section 29-06-15 was enacted by the 1969 Legislative Assembly. See chapter 91, 1969 S.L., Section 4. This chapter altered the law to amend or repeal those provisions which made public intoxication a criminal offense. As we recall the discussion in the Legislative relative to this bill, it was pointed out that in certain instances in which a peace officer is unable to prove a violation of the law prohibiting a person from driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages because the offense was not committed in his presence, the peace officer would then arrest a person for being intoxicated in a public place (the street or highway). Since the law was being amended to provide that public intoxication was no longer a criminal offense, it was apparently believed necessary to provide a different method for arresting a person who was intoxicated and in apparent control of a vehicle but whom the peace officer had not actually observed driving or being in actual physical control of a motor vehicle while intoxicated. Hence section 4 of chapter 91 creating section 6 of section 29-06-15 of the North Dakota Century Code was added to the bill. It was not a portion of the original bill but was added to the bill in the Legislature. See page 448, 1969 Senate Journal.

Subsection 1 of section 29-06-15 was amended in 1967. It originally provided that a peace officer, without a warrant, could arrest a person for a public offense committed or attempted in his presence. The 1967 amendment added the provision that for the purpose of this subsection a crime should be deemed committed or attempted in the presence of a peace officer when what the officer observes through his senses reasonably indicates to him that a crime was in fact committed or attempted in his presence by the person arrested. This had the effect of broadening of the basis for arrest without a warrant. This language is similar to the language contained in section 29-06-16 relative to arrest at night without a warrant. It seems probable that both the 1967 and 1969 amendments may be a result of the decision of the North Dakota Supreme Court in *Colling v. Hjelle* 125 N.W.2d. 453 (1963), in which the Court held that an arrest for a misdemeanor, other than as provided by statute, made without a warrant by a peace officer under mistaken belief, however reasonable, that the offense for which the arrest was made was committed in the officer's presence when in fact the person arrested

is not guilty of the offense is not a lawful arrest. The offense involved in the case was that of driving while under the influence of alcoholic beverages. The Court noted that subsection 2 of section 29-06-16 was the only statutory provision they were able to find which authorized and therefore legalized an arrest though it afterwards appeared that the crime for which the arrest was made was not committed. The Court further noted such authorization was specifically restricted to felonies. Section 29-06-15(6) does now specifically authorize an arrest made upon reasonable cause of driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages without a warrant.

As you have noted, subsection 6 of section 29-06-15 was enacted subsequent to the enactment of section 29-06-16. If there is any conflict, the provisions of section 29-06-15 would prevail. We are even more impressed, however, with the fact that subsection 6 is a specific statute which applies directly to the charge of driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages. Section 29-06-16 is a general statute having no specific reference to any particular charge. A specific statute prevails over a general statute in case of an irreconcilable conflict. See section 1-02-07. We believe the Legislature clearly indicated that an arrest for driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages could be made without a warrant whether at night or any other time.

In direct reply to your question, it is our opinion that section 29-06-15(6) is controlling in the event of an arrest made at night on the charge of driving while under the influence of alcoholic beverages.

HELGI JOHANNESON

Attorney General