



Status and Authority of Off-Duty Officers

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Jeff Welty [blogged](#) last week about [State v. Capps](#), ___ N.C. App. ___, 2019 WL 2180435 (May 21, 2019). The central issue in that case was the state's use of a misdemeanor statement of charges, but there was a minor detail in the facts that caught my eye because it raises an issue I've been asked about more than once.

What is the status and authority of a law enforcement officer when he or she is off-duty?

What Happened?

As Jeff summarized in his post, the defendant in *Capps* got into an altercation with the passenger in his vehicle while putting air in his tires at a truck stop. The argument escalated to the point that the defendant cut off the end of the hose, dragged the passenger out of the car, and attempted to assault her with the hose end. An off-duty deputy happened to be at the truck stop refueling his vehicle. When the deputy saw what was happening, he approached the defendant, "displayed his badge, and lifted his shirt to reveal his service weapon." Undeterred, the defendant got back into his vehicle, drove around the store "burning" his tires, and then headed out through an intersection (between two other vehicles), ran a red light, and took off down the highway at a high rate of speed.

If the facts had played out differently and the deputy had succeeded in detaining the defendant in *Capps*, would it have been a lawful arrest? Was the defendant resisting, delaying, or obstructing an officer by fleeing from the truck stop?

It's an issue that comes up with some regularity in criminal practice. Many law enforcement officers work second jobs such as providing security at nightclubs and private events, or they may carry their firearm and drive a department-issued vehicle even when they are off-duty, just in case they are unexpectedly needed. If an off-duty officer happens to see an impaired driver out on the road, or witnesses an assault taking place, what action is the officer authorized to take?

What's the Rule?

I've heard it said that "an officer is *always* on duty." As a quick rule of thumb, that's not too far off the mark. The North Carolina Supreme Court has generally expressed the same view, but with some limitations:

A police officer when off duty is still an officer and a policeman having the authority, if not indeed the duty to exercise functions pertaining to his office in appropriate circumstances, without regard to departmental rules relating to hours. [...] With regard to our laws dealing with a law enforcement officer's duties as to arrest or search, there is no distinction between on-duty and off-duty status [...] unless it is clear from the nature of his activities that he is acting *solely* on behalf of a private entity, or is engaged in some frolic or private business of his own.

State v. Gaines, 332 N.C. 461 (1992) (holding that the murder of an officer who was providing security for a hotel was

nevertheless committed against an "officer" who was "engaged in his official duties," which supported pursuing death penalty). Accord, *State v. Locklear*, 136 N.C. App. 716 (2000) ("Even an off-duty deputy is considered to be acting under the color of state law when the nature of his actions involve official police action to enforce the law."); *State v. Pope*, 122 N.C. App. 89 (1996) (applying *Gaines* to a "law enforcement officer who was engaged in secondary employment at the time of the murder").

What Are the Limits/Exceptions?

As stated in *Gaines*, there appear to be two circumstances in which an off-duty officer is not authorized to engage in law enforcement functions.

The first circumstance is when the officer is acting "*solely* on behalf of a private entity." For example, [G.S. 74C-21\(b\)](#) states that if an off-duty officer is working directly as an employee for a "licensed security guard and patrol company," the officer is prohibited from wearing his or her uniform or using any official law enforcement equipment. Those restrictions suggest that an off-duty officer would not retain his or her law enforcement authority while engaged in that type of secondary employment.

By contrast, in the more common scenario where an off-duty officer has been hired through the law enforcement agency to provide security at a private business or direct traffic at an event, he or she typically does retain the dual status of being both an officer and an employee. See, e.g., *State v. Lightner*, 108 N.C. App. 349 (1992) (defendant properly convicted of assault on an officer where officer was working authorized secondary employment as a security guard at a restaurant). The Raleigh Police Department's online guide for anyone looking to ["Hire an Off-Duty Police Officer"](#) echoes the rationale behind cases like *Gaines* and *Lightner* by noting that allowing officers to engage in department-approved, off-duty work "enhances the safety and security of the community at large through the increased presence of law enforcement officers."

The second circumstance in which an off-duty officer is not authorized to engage in law enforcement functions is when the officer is "engaged in some frolic or private business of his own." I have been unsuccessful in my search for a case interpreting what constitutes a "frolic" in this particular context. An officer who is out running errands or attending a sporting event with the family is surely engaged in "private business of his own" at that moment, and perhaps even frolicking. But like the off-duty deputy in *Capps*, if the officer sees a crime occurring and tries to intervene, hasn't he or she made a decision to end the frolic or private business and instead carry out his or her "duty to exercise functions pertaining to his office in appropriate circumstances, without regard to departmental rules relating to hours?" If readers have any thoughts on this issue or are aware of any instructive cases, please share them in the comments.

Alternatively, under [G.S. 15A-404](#), even a private citizen has the authority to detain a suspect if there is probable cause to believe the suspect has committed a felony, breach of the peace, a crime involving injury to a person, or a crime involving theft or destruction of property. So presumably an off-duty officer could rely on that authority to interrupt his frolic and detain the suspect until on-duty backup arrives. See G.S. 15A-404(e) ("Surrender to Officer").

Finally, although this post is primarily focused on the officer's authority to act while off-duty, it's also worth noting that the officer's duty status (and, perhaps more importantly, whether he or she is in uniform) may be a factor in cases charging offenses such as resisting arrest or assaulting an officer, since it is an element of those offenses that the defendant knew or had reasonable grounds to know that the person was an officer or was engaged in the performance of his or her official duties at the time. See, e.g., *State v. Burwell*, ___ N.C. App. ___, 808 S.E.2d 583 (2017); *State v. Washington*, 193 N.C. App. 670 (2008).

What About Jurisdiction?

The offenses in *Capps* happened in McDowell County, but the off-duty deputy who happened to be at the truck stop was from Swain County. Could the deputy have effected a lawful, *out-of-county* arrest in this case? The answer may

surprise you. Revisit Shea Denning's post on that issue [here](#).