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FISCAL IMPACT REPORT

ORIGINAL DATE 2/05/07
 LAST UPDATED 2/13/07 HB _____

SPONSOR Beffort

SHORT TITLE Domestic Violence Arrests Without Warrants SB 446/aSPAC

ANALYST C. Sanchez

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates HB423

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General' Office (AGO)
 Department of Public Safety (DPS)
 Administrative Office of the District Attorney (AODA)
 Public Defenders

SUMMARY

Synopsis of Amendment

The Senate Public Affairs amendment removed the requirement that an officer needed exigent circumstances to make an arrest for assault or battery on a household member without a warrant. "Exigent" is generally defined as an emergency.

As amended, the bill allows a law enforcement officer to make a warrant less arrest when the officer has probable cause to believe that a person has committed an assault or battery on a household member. This amendment broadens the scope of situations when a law enforcement officer may make an arrest without a warrant.

Synopsis of Original Bill

Senate Bill 446 amends §31-1-7 NMSA 1978 to clarify when a law enforcement officer can make a warrant less arrest in response to a domestic disturbance that results in assault or battery on a household member.

The bill removes language requiring the arrest to be made at the scene of the disturbance. The bill allows an officer who “responds to” a domestic disturbance and believes an assault or battery on a household member has occurred and the officer believes “exigent circumstances support making an immediate arrest.” Although not defined in the bill, exigent is generally defined as an emergency or imminent danger.

FISCAL IMPLICATIONS

The number of domestic violence cases filed will likely increase throughout the State.

However, there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the state would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

A common fact pattern occurs when police respond to a reported act of domestic violence and they encounter only the victim but not the offender. At the scene, usually informed by reports from the victim or other witnesses, the police learn or suspect that the offender can be found at a different location. Some law enforcement agencies across New Mexico feel constrained by the law from arresting the offender in these circumstances unless the offender is found physically right at the scene where the event occurred.

As many offenders leave the scene to avoid immediate arrest, law enforcement agencies interpreting current law as prohibiting an arrest unless the suspect is at the scene when the officers arrive, place victims in a dangerous situation. In reality, few officers will ever seek a warrant for a crime involving misdemeanor assault or battery on a household member.

Lack of manpower, the number of calls a field officer may have holding, and detectives who are assigned to investigate felony crimes only, all are factors contributing to this reality. Another reality is most victims will not go to a shelter, preferring instead to remain in their homes, many times in an attempt to prevent further trauma on children who may have witnessed the violence.

There are documented instances when victims have suffered further abuse upon the return of the offender after the police have left the scene. Many offenders will call the victim while the police are still at the scene threatening or intimidating the victim over the phone for having called the police. Victims have been informed by officers at the scene of an assault or battery that when the offender was located around the block or several blocks away that the police had no authority to make an arrest, only a criminal summons could be issued.

Police officers are usually limited when making a misdemeanor arrest by the requirement that the misdemeanor be committed in the officer's presence, a rule created by the courts and not required by either the New Mexico Constitution or the United States Constitution. See Boone v. State, 105 N.M. 223, 226, 731 P.2d 366 (1986) ("We long have held that, in the absence of statutory authority, a duly authorized peace officer may make an arrest for a misdemeanor without a warrant only if he has probable cause or reasonable grounds to believe that the offense has been committed in his presence"). New Mexico has adopted a number of statutory exceptions to this rule. The exceptions include statutes authorizing misdemeanor arrests for shoplifting and one for at the scene of a motor vehicle accident. See NMSA 1978, Section 30-16-23 (1965) ("law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the crime of shoplifting"); NMSA 1978 Section 66-8-125 (1978) (officer may arrest without a warrant "any person present at the scene of a motor vehicle accident" where officer has "reasonable grounds to believe the person committed a crime"). The two primary sources for the misdemeanor arrest authority of police in domestic violence situations are found in the Family Violence Protection Act and in the Criminal Procedure Act's warrant less arrest statute that specifically addresses certain domestic disturbance misdemeanors. 05-05 Op. Att'y Gen. 2 (2005).

The Family Violence Protection Act ("FVPA"), NMSA 1978, Section 40-13-2(C) (1995), defines domestic abuse as "any incident by a household member against another household member resulting in..." a number of listed consequences, including physical harm, bodily injury or assault, or threats thereof, and damage to property. The FVPA arrest restriction is broader, imposing the requirement that the officer take steps, including arrest, when "reasonably necessary to protect the victim from further domestic abuse." NMSA 1978, Section 40-13-7(B) (1995). There is no time or place restriction stated in the FVPA arrest authority beyond the requirement that the arrest be reasonably necessary to protect the victim. It is legislative policy that in domestic abuse incidents "New Mexico discourages dual arrests of persons involved" and requires that the "law enforcement officer, in making arrests for domestic abuse, shall seek to identify and shall consider whether one of the parties acted in self defense." NMSA 1978, Section 40-13-1.1 (2002). The other primary authority for domestic abuse misdemeanor arrest authority is Section 31-1-7, NMSA 1978, the Warrant less Arrest Act statute provides, "a peace officer may arrest a person and take the person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause to believe that the person has committed an assault or battery upon a household member."

Tension arises from the phrase, "[w]hen the officer is at the scene of a domestic disturbance" because this phrase can be read to limit the officer's misdemeanor arrest authority to arresting only a person directly and physically at the scene of the disturbance at the same time as the police officer. Such an interpretation would be antithetical, however, to the purpose and tenor of both the FVPA and the specific grant of misdemeanor arrest authority in Section 31-1-7, since it would undercut the most useful application of such authority. 05-05 Op. Att'y Gen. 3 (2005).

By deleting "at the scene of," Senate Bill 446 removes the language that some in law enforcement have interpreted to limit their arrest authority to arresting only those physically at the scene of the disturbance with the police officer.

When officers are dispatched to a domestic disturbance most often they respond to the location of the caller who is usually the victim. Frequently, the victim will have left the location of the domestic disturbance to escape further violence and locate a safe place from which law

enforcement can be notified. Officers may respond to a neighbor’s home, a workplace, a pay phone or an emergency room. Deleting “at the scene of” also recognizes that a victim may travel to another location as a safety measure before notifying police.

There is no express requirement in 31-1-7, NMSA 1978 that the *abuser* needs to be physically at the scene of the domestic disturbance at the same time as the police officer.

Senate Bill 446 would allow the FVPA and Section 31-1-7 to be read consistently and harmoniously in that the restriction on an officer’s arrest authority where an act of domestic violence or abuse occurs would be that the arrest be reasonably necessary and reasonably prompt. See High Ridge Hinkle Joint Venture v. City of Albuquerque, 126 N.M. 413, 415, 970 P.2d 599 (1998) (provisions in statutes should be read together as harmoniously as possible). “No precise geographic or temporal bright lines can be drawn and the lawfulness of any particular arrest depends on how closely it adheres to the reasonableness requirement.” If officers arrest a domestic abuser across town well after the event and do so not to protect the victim but because the victim has informed them the abuser is carrying a substantial quantity of drugs and cash, a district court can correctly conclude the arrest fails the requirement that it be reasonably necessary to protect the victim.” See State v. Miller, 1997-NMCA-060, ¶5, 123 N.M. 507, cert. denied, 123 N.M. 257, 939 P.2d 1065 (1997) (upholding suppression of the drugs and cash when the officer admitted that “but for the drugs and money, the police officer would not have sought Defendant”). 05-05 Op. Att’y Gen. 4 (2005).

Under the misdemeanor arrest provisions of these statutes, officers have protection from civil liability for the exercise of their misdemeanor arrest authority. See NMSA 1978, Section 31-1-7(B) (1995) (“No peace officer shall be held criminally or civilly liable for making an arrest pursuant to this section, provided he acts in good faith and without malice”); NMSA 1978, Section 40-13-7(D) (1995) (“Any law enforcement officer responding to the request for assistance under the Family Violence Protection Act is immune from civil liability to the extent allowed by law”). While these statutes provide protection from civil liability for *exercising* the arrest authority found in the statutes, neither statute addresses civil liability for the consequences arising from *failure* to make an arrest. To the extent the statutes address civil liability, they favor exercising the arrest authority over declining to exercise it.

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

Departmental policy development will vary greatly as agencies grapple with the interpretation of the new language and attempt to provide guidance on the temporal spatial relationships of an appropriate arrest when the suspect is not there when the officer arrives.

DUPLICATION

HB423, duplicate bill

CONFLICT

The proposed enactment affects the enforcement of the Crimes Against Household Members Act, Sections 30-3-10 through 30-3-16, creating an additional requirement that officers determine “exigent circumstances” exist prior to performing a warrant less arrest of a person whom the officer has probable cause to believe has violated the provisions of that act.

The proposed enactment directly conflicts with the provisions of the Family Violence Protection Act, Chapter 40, Article 13. The Family Violence Protection Act requires law enforcement officers to assist alleged victims of domestic abuse by taking certain actions. Included among such actions is a requirement that the officer “arrest[] the abusing household member when appropriate. . .” §40-13-7 (B)(5). No determination of exigent circumstances is required. The responding officer is “immune from civil liability to the extent allowed by law.” Section 40-13-7 (D), NMSA 1978 (1995 amendments). In addition, where there has been a violation of a restraining order in conjunction with a domestic disturbance, the officer “shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order.” Section 40-13-6 (C), NMSA 1978. The arrest of a person who has violated a restraining order is thus a non-discretionary act; the officer is required to arrest, regardless of whether exigent circumstances independently exist.

OTHER SUBSTANTIVE ISSUES

Amending the statute as proposed would subject law enforcement agencies, governing bodies of municipalities, counties and the State of New Mexico to potential litigation over any warrant less domestic violence arrest, by opening the door to claims that the arrest was not proper in that “exigent circumstances” did not exist at the time the arrest was made. This has potential fiscal impact both for payment of potential claims, and in the cost of investigating, defending, and resolving such claims.

ALTERNATIVES

The Department of Public Safety believes the following statement should be included in SB446:

“When the investigating officer develops probable cause that a crime against a household member has occurred the officer shall make an immediate arrest to include instances when the suspect is found later at a physical location away from the original investigation. The time and distance away from the original investigation must be reasonable in light of the victim’s safety.”

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If this bill is not passed the current law will remain subject to the varying interpretation of individual district attorney’s offices and individual police agencies. The other side of this issue is that the changes are subtle and do little more than clarify existing law.