

Citizen's arrest in Virginia: legal but risky

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NOVEMBER 23, 2021

Virginians have lots of images in mind when they think of someone getting arrested for a crime. Sometimes they picture a driver in cuffs on the side of the road. Sometimes they imagine, with the aid of television and movie depictions, someone getting escorted out of a house after a drug raid. Almost always, though, they imagine a police officer making the arrest.

But what about a "citizen's arrest"? One of the defendants in the Ahmaud Arbery trial in Georgia has argued that he was trying to make a citizen's arrest when he shot and killed Arbery. You might wonder, can citizens in Virginia make arrests?

Sometimes.

The law of arrest derives from a variety of sources. Virginia, like most states, has passed a number of laws governing the authority to make arrests. For example, certain officers¹ are allowed to make arrests for offenses even if those offenses weren't directly observed by the officer. In the same vein, officers outside of the territorial limits² of their jurisdiction may still make arrests if they are within prescribed distances of their territory's border.

The Fourth Amendment³ to the U.S. Constitution and Article I, Section 10⁴ of the Virginia Constitution both place limits on the ability of government officials to make arrests. There are, literally, thousands of cases from appellate courts that construe various Constitutional limitations on police officials' ability to make arrests.

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But citizens' arrests are a rare breed in Virginia. There are far, far fewer cases that analyze citizens' arrest powers.

The leading case in Virginia that describes citizens arrests is *Hudson v. Commonwealth*.⁵ Decided in 2003, the case considered whether a police officer from Petersburg could make an arrest in Chesterfield County. There was no dispute that the officer was outside his statutorily authorized jurisdiction to stop a suspected drunk driver.

But the Supreme Court held the Petersburg officer was authorized to make the stop as part of a "common law" citizen's arrest. The

officer, stripped of his authority as a law enforcement officer from Petersburg, was still permitted to make a citizen's arrest in Chesterfield. The authority for the citizen's arrest wasn't in the Constitution and it wasn't a law passed by the General Assembly. The authority was historic "common law" that the Virginia General Assembly has, so far, never attempted to change.

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So, what makes for a permissible common law citizen's arrest? There are two central requirements:

First, there must be a "breach of the peace" or a felony being committed by the person who is subject to being arrested. So, if a citizen sees a suspect assaulting someone, the citizen can probably make a citizen's arrest. That's because an assault is surely a "breach of the peace." In the *Hudson* case, the danger inherent in drunk driving was sufficient to allow a citizen's arrest for that offense.

Second, the "breach of peace" or felony must be committed "in [the] presence" of the citizen who wants to make an arrest. This limitation makes sense. If citizens could make arrests based on hearsay accounts or long stale information that they did not themselves witness, the possibility of abusing the citizen arrest power would be very high.

There are real limitations, though, on the common law citizen's arrest power. These limitations should make citizens very carefully consider whether they might attempt an arrest. First, if you put your hands on someone and you don't have the authority to do that, the person you are touching may well use self defense to stop you.⁶ Second, if a citizen arrests someone and they are wrong about their right to do so, they may be liable civilly for making a false arrest.⁷ Third, a citizen who makes a wrongful citizen's arrest may themselves be committing a crime including, for example, abduction.⁸

It is easy to see why arrests are, generally, left to the judgment of trained law enforcement officers. Citizens who choose to attempt an arrest must be very careful that they do not create greater risks and

dangers, to themselves and to others, by attempting an arrest than they would have if they determined to simply call the police.

Notes

¹ <https://bit.ly/3cFYqiu>

² <https://bit.ly/3oTt3a4>

³ <https://bit.ly/3nFpXqx>

⁴ <https://bit.ly/3oUNEdW>

⁵ <https://bit.ly/3cBFFwP>

⁶ <https://bit.ly/3HJ9SIw>

⁷ <https://bit.ly/3r1ASNC>

⁸ <https://bit.ly/3cEZmDW>

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This article was published on Westlaw Today on November 23, 2021.

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