

Opinion 2012-020

June 18, 2012

The Honorable Kathy Webb
State Representative
Post Office Box 251018
Little Rock, Arkansas 72225-1018

Dear Representative Webb:

You have requested my opinion on the following question concerning the use or sale of blue lights:

Does Ark. Code Ann. § 5-77-201 cover the use or sale of any automotive lighting products that include blue lights that do not flash or rotate, and which are not otherwise similar in appearance to an emergency vehicle light when used?

RESPONSE

In my opinion, if, as your question suggests, an “automotive lighting product” is not “similar in appearance” to an “emergency vehicle light when used” in any way other than that it is blue, it will probably not fall directly within the scope of A.C.A. § 5-77-201. However, this conclusion stated in the abstract has virtually no relevance to the practical question in each case – namely, whether a blue light is sufficiently “similar in appearance” to an “emergency vehicle light when used” to trigger the statutory restrictions. Moreover, this statute read in isolation does not account for restrictions set forth in other provisions of the Code, which, read together, suggest a strong – and, in my opinion, highly sensible – legislative conclusion that access to blue lights, which are widely perceived by the public as distinctly “official,” should be restricted to authorized officials engaged in law enforcement. Purely by way of example, one statute flatly bans the display of any vehicular blue light on any Arkansas highway. It is unclear precisely how this proscription relates to the provisions of A.C.A. §§ 5-77-201 and 27-36-301(b),

which restrict to law enforcement officers and coroners the sale and use, respectively, of “blue lights” as defined in those statutes. Legislative clarification is warranted regarding the interplay of the various statutes addressing the sale and use of blue lights. With respect to the particular statute you have recited, only a finder of fact could determine its applicability in any given case.

DISCUSSION

As discussed immediately below, the statute referenced in your question deals only with the sale, purchase or transfer of blue lights, not with their “use.” Given your expressed concern for both sales and use, however, I will address the pertinent statutes dealing with each.

Your question seeks my opinion regarding the legality of selling or using any “automotive lighting product” that has three characteristics: (1) it emits blue light; (2) it does not flash or rotate when operated; and (3) it is not “otherwise similar in appearance” to “an emergency vehicle light when used.” Narrowly read, then, your question appears to be simply whether it is illegal solely under the statute you have recited to sell or to use an “automotive lighting product” that emits blue light. In order meaningfully to address this question as regards both sales and use, I must consider the various pertinent statutes together.

I have put the phrase “blue light” in quotation marks in my previous paragraph because it is a term of art in several statutes with a specific meaning that extends beyond mere light and blueness. Under these statutes considered in isolation, a prohibition against the sale or use of a “blue light” as defined will turn on its meeting all of the conditions that apply to that technical designation.

Section 5-77-201 of the Code, which you invoke in your question, provides in pertinent part:

- (a)(1) It is unlawful to sell or transfer a blue light or blue lens cap to any person other than a law enforcement officer or a county coroner.
- (2) It is unlawful for a person other than a law enforcement officer or a county coroner to buy a blue light or blue lens cap.

* * *

(e) As used in this section:

(1) “Blue lens cap” means a lens cap designed to produce a blue color of light when light from a device designed for an emergency vehicle passes through the lens cap; and

(2) “Blue light” means any *operable device that*:

(A) Emits a blue color of light;

(B) *Is designed for use by an emergency vehicle or is similar in appearance to a device designed for use by an emergency vehicle;*
and

(C) Can be operated by use of the vehicle’s battery, the vehicle’s electrical system, or a dry cell battery.¹

As an initial matter, I must point out that this statute restricts only the *sale, purchase or transfer* of any qualifying “blue light” or “blue lens cap.” It does not expressly restrict the *use* of any such device, which is also a matter of concern in your question.

With respect to the *use* of a “blue light” as statutorily defined, the Code provides in pertinent part:

(b) Except as otherwise provided by the Arkansas Code,^[2] it is unlawful for any person to install, activate, or *operate a blue light* in or on any vehicle in this state or to possess in or on any vehicle in this state a blue light that is not sealed in the manufacturer’s original package. As used in this section, *“blue light” means an operable blue light which*:

¹ A.C.A. § 5-77-201 (Supp. 2011) (emphases added). Any sale of a blue light or blue lens cap must be reported to the Arkansas State Police. *Id.* at (c). A violation of Section 5-77-201 constitutes a Class D felony. *Id.* at (d).

² I will discuss the possible application of other provisions of the Code in my text, *infra*.

(1) *Is designed for use by an emergency vehicle, or is similar in appearance to a blue light designed for use by an emergency vehicle;* and

(2) Can be operated by use of the vehicle's battery, the vehicle's electrical system, or a dry cell battery.³

Under each of these statutes, the blueness of a light in itself is a necessary, but not sufficient, condition to render the light a “blue light” potentially subject to the statutory proscriptions.⁴ Under both statutes, in order to qualify as a “blue light,” a device must as a threshold matter emit blue light, presumably either because the bulb is blue or the lens cap is blue.⁵ However, the light will not constitute a “blue light” under the Code unless it meets two additional conditions: first, it must be “operable” using any one of the power sources recited in subsections (c)(2)(C) and

³ A.C.A. § 27-36-301(b) (Repl. 2008) (emphases added). In comparison, A.C.A. § 5-77-204(a)(2) (Supp. 2011) declares it unlawful for a person who has pleaded guilty or nolo contendere to or has been found guilty of a felony or third-degree domestic battery or a person required to register as a sex offender to “[i]nstall or use an emergency vehicle light . . . on a motor vehicle that reasonably appears to be or that mimics a law enforcement vehicle[.]” Subsection (c)(1) of this statute defines an “emergency vehicle light” as follows:

“Emergency vehicle light” means a device that emits a light of any color and that is:

- (A) Designed for use by an emergency vehicle; or
- (B) Similar in appearance to a device designed for use by an emergency vehicle[.]

Under the principle of statutory construction known as *expressio unius est exclusio alterius*, “the express designation of one thing may properly be construed to mean the exclusion of another.” *Gazaway v. Greene County Equalization Bd.*, 314 Ark. 569, 575, 864 S.W.2d 233 (1993). Given the various broader statutory proscriptions against the use of blue lights that resemble lights “designed for use by an emergency vehicle,” I do not believe this principle should be applied in this case to suggest that only the listed offenders are proscribed from using such lights. Legislative clarification on this point is warranted, however.

⁴ In comparison, a “blue lens cap” as defined in the statute is subject to the proscription if it is designed to produce blue light when used in conjunction with any “device designed for an emergency vehicle.”

⁵ Subsection 27-36-301(b), unlike A.C.A. § 5-77-201, does not expressly reference a blue lens cap separately from a blue light. I consider this omission immaterial for purposes of my analysis, given that one might “operate a blue light” as contemplated in A.C.A. § 27-36-301(b) either by using a blue bulb or a blue lens cap covering a clear bulb. In accordance with this reading, I consider it consistent with legislative intent to extend to a blue lens cap the statutory proscription against possessing an unsealed blue light in a vehicle. However, Arkansas State Police Regulation 1998-1, § 5, which tracks the provisions of A.C.A. § 27-36-301(b) regarding use, does not expressly reference the possession in a vehicle of an unsealed blue lens cap.

(b) of the respective statutes; and, secondly, it must either be “designed for use by an emergency vehicle” or be “similar in appearance” to a “blue light” or to a “device” that is “designed for use by an emergency vehicle.”⁶

As phrased, your question *assumes* that the device at issue does not meet the prong that requires that it either be “designed for use by an emergency vehicle” or that it be “similar in appearance to a blue light designed for use by an emergency vehicle.”⁷ Given this crucial assumption, it may be that neither of the two statutes just discussed would directly apply. The statute recites the “similar in appearance” requirement as a separate prong, suggesting that the referenced similarity must consist in something more than *just* the blueness of the light. In terms of your question as phrased, then, if the device is “not *otherwise* similar in appearance to an emergency light when used” (your language; emphasis added), it would not appear to qualify as a “blue light” under either of the referenced statutes.⁸

The conclusion just stated strikes me as of minimal practical significance, however, given the narrowness with which you have phrased your question. With respect to the sale of blue lights, for instance, your question could accurately be paraphrased as follows: “If a product does not meet the conditions for restricting sales under this particular statute, does this particular statute apply to restrict sales?” The answer to this question is obvious, but it leaves unaddressed two crucial separate issues, which your question appears to obscure, applicable to both sales and use: first, what is required to render a blue light “similar in appearance” to a “device designed for use by an emergency vehicle” – i.e., what quantum of

⁶ I attach no significance for purposes of this analysis to the fact that one of the two statutes setting forth this alternative references a similarity to “a *blue light* designed for use by an emergency vehicle,” A.C.A. § 27-36-301(b)(2), whereas the other references a similarity to “a *device* designed for use by an emergency vehicle,” A.C.A. § 5-77-201(e)(2)(B). In both statutes, what is crucial is clearly that the blue-light emitting device resemble one that both emits blue light and is “designed for use by an emergency vehicle.”

⁷ Needless to say, a device actually “designed for use by an emergency vehicle” will necessarily be “similar in appearance” to one “designed for use by an emergency vehicle.” You appear to be concerned only with the latter category – namely, blue lights that are not the actual product models used by law enforcement officers and coroners, but rather ones that might arguably be considered “similar in appearance” and hence subject to restrictions.

⁸ To conclude otherwise would be impermissibly to resolve against a criminal defendant’s interests a possible ambiguity regarding whether the sale, transfer, purchase or use of a particular light is barred pursuant to one of these criminal statutes. *See, e.g., Heikkila v. State*, 352 Ark. 87, 98 S.W.3d 805 (2003) (acknowledging that criminal statutes are to be strictly construed, with all doubts resolved in favor of defendants).

similarity, over and above blueness, might be required to render a product subject to the restrictions; and, secondly, what other restrictions set forth in the Code might independently apply.

With regard to latter consideration, I must note that this office has previously opined that other provisions of the Code, whose applicability is acknowledged in A.C.A. § 27-26-301(b),⁹ support concluding that the blueness of a light might in itself render the light sufficiently similar to a device “designed for use by an emergency vehicle” to foreclose its installation on a non-emergency vehicle.¹⁰ In this previous opinion, my predecessor analyzed as follows the applicability of various other statutes contained in the Code:

Because the above-quoted provision [A.C.A. § 27-36-301(b)] clearly prohibits installing blue lights on vehicles “except as otherwise provided by the statutes of the State of Arkansas,” it is necessary to consult the statutes that authorize the use of blue lights. The use of blue lights is authorized only on police agency vehicles. This authorization is stated primarily in A.C.A. § 27-36-303, which requires the use of blue lights on all “police motor vehicles which are equipped with emergency lighting and operated within the State of Arkansas.” The authorization is reiterated in A.C.A. § 27-49-219, which, defining “authorized emergency vehicle,” *limits the use of blue lights to vehicles “used by state, county, city, or municipal police agencies.”*

I also note that the statute prohibits only the use of blue lights that are “designed for use by an emergency vehicle,” or that are “similar in appearance to a blue light designed for use by an emergency vehicle.” *In my opinion, this prohibition extends to any blue light.* I base this conclusion on the fact that A.C.A. § 27-49-219(d) imposes a very general requirement that police vehicles be equipped with blue lights. The requirement is not limited to flashing or rotating blue lights. That statute defines “authorized emergency vehicle” as follows:

⁹ I refer, of course, to the language “Except as otherwise provided by the Arkansas Code.”

¹⁰ See Op. Att’y Gen. No. 2004-099 (opining that it would violate Arkansas law to drive a limousine equipped with a blue side marker light mount on the roof pillars of the side of the vehicle between the side windows).

(d)(1) “Authorized emergency vehicle” means authorized emergency vehicles, which shall include:

(A) Motor vehicles used by state, county, or city and municipal police agencies, all of which shall be equipped with:

(i) Blue; or

(ii) Blue, red, or white rotating or flashing emergency lights;

A.C.A. § 27-49-219(d)(1).

Because motor vehicles that are used by police agencies are required to be equipped with blue lights generally, it is my opinion that the use of any type of blue lights on other vehicles is prohibited.¹¹

For several reasons, I cannot fully subscribe to my predecessor’s analysis. First, I believe it is mistaken to read A.C.A. § 27-36-303 as establishing that “[t]he use of blue lights is authorized *only* on police agency vehicles” (emphasis added). This statute provides as follows:

All state, county, or city and municipal police agencies shall install, maintain, and exhibit blue rotating or flashing emergency lights upon all police motor vehicles which are equipped with emergency lighting and operated within the State of Arkansas.¹²

¹¹ Opinion No. 2004-099 (emphases added).

¹²A.C.A. § 27-36-303 (Repl. 2008). In Act 753 of 1995, the legislature amended A.C.A. § 27-4-219 to provide that official police lights could be “blue or blue, red or white rotating or flashing emergency lights.” These two statutes are both still in effect.

With regard to restrictions on who may use flashing lights, *compare* A.C.A. § 27-36-208(c) (Repl. 2008) (permitting flashing lights only on authorized emergency vehicles and school buses, except to indicate turns or to warn of “a vehicular traffic hazard requiring unusual care in approaching, overtaking, or passing”) with A.C.A. § 27-49-219(d)(2) (Supp. 2011) (declaring it “unlawful to install, operate, or use any rotating or flashing light on any motor vehicle except as authorized in this subsection,” which addressed “authorized emergency vehicles”).

Although A.C.A. §§ 27-36-303 and 27-49-219(d) both appear to require that police emergency vehicles be equipped with rotating or flashing lights, neither statute mandates that those lights operate exclusively in

In my opinion, this statute does no more than specify a lighting requirement for police motor vehicles. It does not in itself expressly or by implication foreclose any other variety of vehicle from displaying a blue light that is not otherwise “similar in appearance” to a device “designed for use by an emergency vehicle.”¹³ This analysis consequently leaves open the question of whether the statutes discussed above might permit someone other than a law enforcement officer or a coroner to sell, transfer, buy or use a device that emits blue light but does not otherwise qualify as a “blue light” under the statutory conditions applicable to that term.

I believe a similar objection applies to my predecessor’s application of A.C.A. § 27-49-219(d)(1), which is quoted above. In my opinion, a close reading of this statute in its present form does not support my predecessor’s conclusion that the statutory restrictions set forth in A.C.A. § 27-36-301(b) extend to “any blue light,” thereby “limit[ing] the use of blue lights to vehicles ‘used by state, county, city, or municipal agencies.’” In the version of subsection (d)(1) in effect at the time my predecessor issued his opinion, the statute merely included such vehicles within the general category of “authorized emergency vehicle” and required that they be equipped with either “blue” or “blue, red, or white rotating or flashing emergency lights.” Although not declaring as much directly, my predecessor apparently reasoned that if any blue light would serve to characterize a vehicle as an “authorized emergency vehicle,” any vehicular blue light would of necessity be “similar in appearance” to a “blue light designed for use by an emergency vehicle,” thus triggering the statutory proscription against its use by anyone other than a law enforcement officer or a coroner.

one or the other of these modes. As my predecessor rightly pointed out, the lighting requirement for emergency vehicles set forth in the text of A.C.A. § 27-49-219(d)(1) “is not limited to flashing or rotating blue lights.” I concur in this conclusion. See discussion in my text *infra* regarding the use of fixed blue lights.

¹³ In offering this conclusion, I am not ignoring the principle of *expressio unius est exclusio alterius* set forth in note 3, *supra*. In my estimation, this principle applies to the provisions of A.C.A. § 26-37-303 only to the extent of foreclosing vehicles other than those listed in the statute from displaying “emergency lighting” in the form of “blue rotating or flashing emergency lights.” Left unresolved is the question of whether a vehicle other than those referenced in the statute might display, say, an inconspicuous blue side light that is fixed and constant in its directional beam.

As noted above, the version of A.C.A. § 27-49-219(d)(1) in effect at the time my predecessor issued his opinion included the following within the designation of “emergency vehicles”:

(A) Motor vehicles used by state, county, or city and municipal police agencies, all of which shall be equipped with:

(i) Blue; or

(ii) Blue, red, or white rotating or flashing emergency lights[.]

This statute was amended by Acts 2011, No. 789, § 4, adding the word “lights” after the word “Blue” in subsection (d)(1)(A)(i). This amendment may mark no more than an editing change that enables the subsection to stand alone without having to refer to the subsequent subsection in order to determine what noun the adjective “blue” modifies. However, it may alternatively clarify that the reference to “blue light” is to be interpreted as the term of art defined above, under which the blueness of the light standing alone, without some additional element of similarity to a “blue light designed for use by an emergency vehicle,” is insufficient to trigger the statutory prohibition set forth in A.C.A. § 27-36-301(b).

Subsection 27-49-219(d)(1) becomes problematic, then, when considered in conjunction with A.C.A. §§ 5-77-201 and 27-36-301. This problem arises from the fact that A.C.A. § 27-49-219(d)(1) cryptically suggests that equipping an official vehicle with “blue lights” will in itself render the vehicle an “authorized emergency vehicle,” presumably recognizable as such. The statute does not address whether a “blue light” must meet the conditions set forth in A.C.A. §§ 5-77-201 and 27-36-301 – i.e., whether, independent of its blueness, the light must in some other way be “similar in appearance” to a device “designed for use by an emergency vehicle” – or whether any blue light will suffice to mark an “emergency vehicle” as such. However, adopting the latter interpretation would render meaningless the additional “similarity” requirement set forth in A.C.A. §§ 5-77-201 and 27-36-301, since if the only defining feature common to any “emergency vehicle” is its display of a blue light, *any* blue light will be “similar in appearance” to one “designed for use by an emergency vehicle.” This reading of the statute would render merely redundant the similarity provisions in A.C.A. §§ 5-77-201 and 27-36-301 requiring that a light subject to restrictions not only be blue but further be “similar in appearance to a device designed for use by an emergency vehicle.” It is an established rule of statutory construction that language in a statute will not be given a construction that renders it mere

surplusage.¹⁴ The Arkansas courts have further long held that in interpreting statutory language, it is inappropriate to give the statute a reading that would result in an absurdity, or to presume that the legislature enacted a vain and meaningless law.¹⁵ Accordingly, considering all of the statutes discussed thus far, I believe the “similarity” provision should be read as extending beyond the mere fact of a vehicular light’s blueness.

In my opinion, however, my predecessor’s conclusion draws support from the following unacknowledged statutory provision:

No person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red, blue, or green light visible from directly in front of the center thereof.¹⁶

The unitary term of art “blue light” does not appear in this statute, suggesting that the legislature did not necessarily intend that the term designate a light subject to all three of the conditions set forth in A.C.A. §§ 5-77-201 and 27-36-301. Read in isolation, this statute would appear to foreclose the use of any blue vehicular light by *any* party – including, for that matter, officials – on a “highway.” To the extent that this statute, in imposing a global restriction on the highway use of blue lights irrespective of the user’s status, conflicts with A.C.A. § 27-36-301, which expressly authorizes the use of “blue lights” by law enforcement officers and coroners, I believe the latter statute, which is the more specific of the two, would control.¹⁷ I must note, however, that the blanket proscription set forth in A.C.A. § 27-36-208(b)(1), which has not been addressed by this office or in the case law, is confusing considered in the context of the other statutes discussed above.

¹⁴ See, e.g., *Stephens v. Arkansas School for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000); *Central & Southern Companies, Inc. v. Weiss*, 339 Ark. 76, 3 S.W.3d 294 (1999); and *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999).

¹⁵ See *Yarbrough v. Witty*, 336 Ark. 479, 484, 987 S.W.2d 257(1999); *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 948 S.W.2d 1 (1998); *Citizens To Establish A Reform Party v. Priest*, 325 Ark. 257, 926 S.W.2d 432 (1996); *Henson v. Fleet Mortgage Co.*, 319 Ark. 491, 892 S.W.2d 250 (1995); *Neely v. State*, 317 Ark. 312, 877 S.W.2d 589 (1994); *Death and Total Permanent Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (1992).

¹⁶ A.C.A. § 27-36-208(b)(1) (Repl. 2008). The language “blue, or green” was added to this statute pursuant to Acts 2003, No. 539, § 1.

¹⁷ See *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994) (holding that a general statute normally does not apply where there is a specific statute governing a particular subject matter).

Although the foregoing analysis is necessarily somewhat confusing, what is clear, in my estimation, is that the public generally associates a blue light, particularly if it is flashing, with an official engaged in the discharge of his official duties.¹⁸ Given this fact, I believe an authority charged with determining the propriety of offering for public sale any given model of blue light might justifiably conclude that its blueness alone at the very least goes a long way towards rendering it impermissibly “similar in appearance” to a device “designed for use by an authorized emergency vehicle.” In this regard, I do not consider it of dispositive significance that a light offered for sale does not “flash or rotate,” as you posit in your hypothetical. Indeed, my inquiries reveal that an unmodified, standard-issue “blue light” that is expressly “designed for use by an emergency vehicle” can be tripped at will by an officer to operate in a non-flashing mode and that it frequently does so during field-sobriety tests conducted in the course of DWI stops. My point is that only a slight quantum of similarity, other than mere blueness, may be required to render a product confusingly “similar in appearance” to a device “designed for use by an authorized emergency vehicle.”

In each instance, however, the determination of whether a product crosses the line and offends a provision of the Code will involve making a factual determination of the sort this office is neither equipped nor authorized to undertake. As regards the interrelationship among the statutes discussed above, legislative clarification is strongly warranted.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

¹⁸ This association is frankly strong enough to prompt the question why an individual who is not a designated official would in good faith be inclined to purchase a blue light in the first place.