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ABSTRACT

The purpose of this study was to develop a manual on the Texas laws of arrest for use by state and local law enforcement officers. It is not intended to be a legal treatise, although pertinent statutes and court decisions are reviewed and suggestions made for legislative change. A brief history of the laws of arrest is presented, together with a review of the constitutional limitations on the power of the law enforcement officer. The study focuses on the following primary areas of concern: (1) definition, history and elements of arrest, (2) authority to make arrest, (3) constitutional limitations on the power to arrest, (4) arrest with warrant, (5) arrest without warrant, (6) ancillary arrest authority, (7) use of force, (8) immunity from arrest, (9) disposition procedures following arrest, and (10) problems relating to unlawful arrest. Existing "model" legislation is presented, including the Uniform Arrest Act and the Model State Statute on "Stop and Frisk." This document previously announced as ED 052 375. (Author/GEB)

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Vol. II, No. 5

Texas Laws Of Arrest: A Comprehensive Manual For The Law Enforcement Officer

Edwin Dale Heath, Jr.
Hazel B. Kerper
George G. Killinger
Dorothy D. Hayes

INSTITUTE OF CONTEMPORARY CORRECTIONS
AND THE BEHAVIORAL SCIENCES
SAM HOUSTON STATE UNIVERSITY
Huntsville, Texas 77340

INSTITUTE OF CONTEMPORARY CORRECTIONS
AND THE BEHAVIORAL SCIENCES
SAM HOUSTON STATE UNIVERSITY
HUNTSVILLE, TEXAS 77340

ADMINISTRATION OF MONOGRAPH

GEORGE G. KILLINGER,
Director of Institute

CHARLES M. FRIEL, *Director*
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TEXAS LAWS OF ARREST:
A COMPREHENSIVE MANUAL FOR THE LAW ENFORCEMENT OFFICER

Edwin Dale Heath, Jr.
Hazel B. Kerper
George G. Killinger
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INSTITUTE OF CONTEMPORARY CORRECTIONS
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SAM HOUSTON STATE UNIVERSITY
Huntsville, Texas 77340

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CHAPTER I

INTRODUCTION

The law enforcement officer of today faces the greatest challenge to his profession in the history of our nation. A rapidly rising crime rate, widespread civil unrest, complex court decisions and a growing permissiveness in our society present extraordinary problems which the peace officer must be prepared to handle.[1] He must be professionally trained, fully equipped and thoroughly oriented to the increasing demands made upon him to meet these social and legal challenges.

Hopeful signs that this problem is being squarely faced are shown in recent efforts of the Congress of the United States and the Texas Legislature to upgrade and improve the training of law enforcement officers. The public, too, has voiced its demands for improved police service through provision of better training and equipment and through community effort in support of local officers. The Federal Omnibus Crime Bill of 1968, the 1967 updating of the laws of arrest in Texas by the 60th Texas Legislature and the establishment of the Texas Commission on Law Enforcement Standards and Education of 1967 are examples of legislation recently passed to achieve these goals.

Purpose

It is the purpose of this study to provide a comprehensive manual

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[1]Handbook for Texas Law Enforcement Officers (Austin, Texas: The Texas Commission on Law Enforcement Procedures, 1968), p. i.

on the Texas laws of arrest for use by state and local law enforcement officers. It is not intended to be a legal treatise, although pertinent statutes and court decisions are reviewed and suggestions made for legislative change.

Need for Research

One legal writer has stated, "There is perhaps no title of criminal jurisprudence less known, and more important to be known, than that relating to arrests."[2]

Hopefully, this study will serve to eliminate or mitigate the following situations:

1. The average law enforcement officer is untrained in legal research and thus finds it extremely difficult, or even impossible, to locate and review the numerous statutes in Texas law relating to the powers of arrest. Such powers may be variously found in the Constitution of the State of Texas, the Texas Penal Code, the Texas Code of Criminal Procedure, the Revised Civil Statutes of the State of Texas and in the ordinances of incorporated towns and cities. Complete sets of these statutes are seldom available to arresting officers, particularly those who serve in smaller jurisdictions.

2. Few police agencies have the resources to conduct proper training in this area on the officer's level.

3. Most agencies are totally lacking in in-depth or empirical studies of court interpretation of the statutes covering arrest. With the change in judicial attitudes since the beginning of the "criminal law revolution" of the 1960's, it is essential that the officer be familiar with major court decisions concerning the power to arrest.

Methods and Procedures

A brief history of the laws of arrest is presented, together with

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[2]Clarence Alexander, The Law of Arrest (Buffalo, N.Y.: Dennis and Company, Inc., 1949), Vol. 1, p. iii.

a review of the constitutional limitations on the power of the law enforcement officer.

The term "arrest" is defined on the basis of the statutes and the pertinent decisions of both state and federal courts, and arrest is distinguished from other forms of restraint and from summons. All statutes empowering arrest, except those of limited application (such as the civil arrest authority of state comptroller's agents, game wardens and probation and parole officers), are set forth and analyzed in light of court decisions.

The study focuses on the following primary areas of concern: (1) definition, history and elements of arrest; (2) authority to make arrests; (3) constitutional limitations on the power to arrest, including the requirement of probable cause; (4) arrest with warrant; (5) arrest without warrant; (6) ancillary arrest authority, including detention and summons; (7) use of force in making an arrest; (8) immunity from arrest; (9) disposition procedures following arrest; and (10) problems relating to unlawful arrest.

Existing "model" legislation is presented, including the Uniform Arrest Act and the Model State Statute on "Stop and Frisk". Recommendations are made for legislative changes, some of which would incorporate provisions of the model acts.

CHAPTER II

"ARREST" DEFINED

The word "arrest" is derived from the French word, "arrerer", which means "to stop, to detain, to hinder, or to obstruct". In the abstract, it means "a frustration of or impediment to the free movement or locomotion of another". In the concrete, it means "a seizure or taking possession of the person of another against his will; restraint, however slight, on another's liberty to come or go or remain, as he wills or wishes, whether that will or wish is known to the restrainer or not; manifestation of governmental authority, accompanied by apparent means of exercising it, and a communicated purpose to exercise it, so that restraint compels one to yield involuntarily to such exercise".[1]

The classic definition of "arrest", as the word is used in criminal law, is stated by Blackstone, the famous writer of the common law, as, ". . . the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime."[2]

As one author concludes, "In any event, it is well established that 'arrest', as used in criminal procedure, signifies that one so taken or detained is thereby subjected to the actual control and will of the person making the arrest. The essence of the term is restriction of

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[1]Alexander, op. cit., p. 353.

[2]Ex parte Sherwood, 29 Tex. Crim. App. 334; 15 S.W. 812 (1890).

the person; restraint of the person."[3]

Statutory Definition of "Arrest"

In the state of Texas the term "arrest" is defined by statute as follows:

> A person is arrested when he has been actually placed under restraint or taken into custody by an officer or other person executing a warrant of arrest, or by an officer or other person arresting without a warrant.[4]

The terms "restraint" and "custody" are not statutorily defined in the Texas Code of Criminal Procedure. The term "restraint" seems to have a universal meaning among legal authorities to the extent that it is a "restriction, however slight, on another's liberty to come or go or remain as he wills".[5] The term "custody" seems to have a like universal meaning as "the detention of one after his seizure or arrest".[6]

Judicial Definition of "Arrest"

The Texas Court of Criminal Appeals has defined "arrest" in a criminal case as "the apprehending or detaining of the person in order to be forthcoming to answer an alleged or suspected crime".[7] In criminal cases, the purpose of the arrest is to assure the answer of the apprehended person to a charge of the commission of some crime. A lawful

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[3]Edward C. Fisher, Laws of Arrest (Evanston, Illinois: Northwestern University Traffic Institute, 1967), p. 7.

[4]Article 15.22, C.C.P.

[5]Ibid.

[6]Alexander, op. cit., p. 354.

[7]Ex parte Sherwood, supra.

arrest, with or without a warrant, falls within the statutory definition of the term "accusation" and means "a charge made in a lawful manner against any person that he has been guilty of some offense that subjects him to prosecution in the name of the State".[8]

The United States Supreme Court has stated:

> An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follow.[9]

The Texas Court of Criminal Appeals has used two judicial tests to determine the status of a person under arrest. The first is whether the person arrested is "free to go". If he is free to go where he chooses, or believes himself to be so, and is in no way restrained, then the person is not under arrest.[10] However, if he is not free to go and his liberty is restrained even in the slightest, he is under arrest.[11] By merely talking to a person the law enforcement officer does not automatically place that person under arrest. There must be a restraint of freedom or an element of custody or control before the arrest is complete.[12]

The second test of the status of an arrest is the "state of mind"

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[8] Texas Jurisprudence, 2d Edition (San Francisco: Bancroft-Whitney Company, 1959), Vol. 6, "Arrest", p. 138.

[9] Terry v. Ohio, 392 U.S. 1; 88 S. Ct. 1868 (1968).

[10] Rolan v. State, 338 S.W. 2d 457 (1960).

[11] Nolen v. State, 9 Tex. Cr. App. 425 (1881).

[12] Bannon v. State, 406 S.W. 2d 908; Cert. Den. 87 S. Ct. 38 (1966).

of the accused. The Court theorizes, ". . . whether the accused is or is not under arrest is to be determined from the sufficiency of the facts to reasonably create the impression on his mind that he is under arrest."[13] Where sufficient facts do exist to make such an impression on the mind of an accused, he will be deemed under arrest.[14]

The United States Supreme Court has held that whenever a police officer accosts an individual and restrains his freedom to walk away, the officer has "seized", or arrested, the individual.[15] Further, in its most recent decision on the subject, the Court held that an individual is under arrest any time his freedom of action is deprived in any way.[16]

History of Arrests

The history of the power to arrest is buried in the antiquity of the common law.[17] Long before the advent of public officers such as the sheriff, the conservator of the peace, the constable and finally the policeman, there was a duty imposed on the ruling lords of the realm and on the citizen to maintain public peace and safety and to apprehend all violators thereof. A public service was demanded of all citizens by custom and by various parliamentary acts.

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[13] Gilbreath v. State, 412 S.W. 2d 90 (1967).

[14] Summers v. State, 182 S.W. 2d 720 (1945).

[15] Terry v. Ohio, supra.

[16] Orozco v. Texas, 394 U.S. 324; 89 S. Ct. 1095 (1969), citing Miranda v. Arizona, 384 U.S. 436; 86 S. Ct. 1602 (1966).

[17] 6 C.J.S., "Arrests", Sec. 2, p. 569.

[18] Fisher, op. cit., p. 359.

When violation of the common law occurred, an alarm was given known as the "hue and cry". This alarm went out by horn and voice in the earliest times, and each citizen was bound by duty to respond in order to apprehend the violator. Early systems of arrest paid bounties and rewards to private citizens for the apprehension of felons, and, since most crimes against the common law were deemed felonies, the system apparently worked for centuries. However, with the passage of time, parliamentary law developed the law enforcement officer, and the authority to arrest passed from the private citizen.

The early common law authority to arrest was brought to this country virtually intact, authorizing arrest for felonies, breaches of the peace and theft. This common law influence can be seen in early codes of criminal procedure and even in those in effect today. Chapter 14 of the 1965 Texas Code of Criminal Procedure virtually summarizes the common law arrest powers into Texas statutes by authorizing arrest without warrant for felonies and breaches of the peace and arrest of fleeing felons and includes an admonishment to take the arrested person before a magistrate.

Elements of An Arrest

In order to constitute an arrest, it is essential that custody and control be assumed over the person in question, either by force or by his consent and submission. The officer's statement to the accused that he is under arrest is insufficient to complete the arrest.[19]

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[19]Texas Jurisprudence, op. cit., p. 139.

The complete arrest involves four distinct elements: (1) purpose or intention to effect an arrest, (2) under actual or assumed authority, (3) accomplished by an actual or constructive seizure or restraint by the arresting person of the one to be arrested, (4) with the understanding by the arrested person that he is being arrested.[20]

When making an arrest in Texas, it is unnecessary for the officer to make any formal statement to the accused or to use any particular words or to touch the accused's person. The arrest is complete if the accused submits to the command of the officer and considers himself under arrest.[21] The fact of the arrest can be shown or proven by the facts and circumstances in each case.[22] Words alone, without custody or control over the arrested person, do not constitute an arrest, regardless of the intention of the arresting officer.

The Texas Code of Criminal Procedure provides, ". . . an arrest may be made on any day or at any time of the day or night."[23] Time and date are not, therefore, essential elements of an arrest in Texas, although they are in some other jurisdictions.

Forms of Restraint Differing from Arrest

Keeping in mind the essential elements of an arrest, it is necessary to distinguish arrest from other situations involving interference with personal liberty by law enforcement officers in the course

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[20]Fisher, op. cit., p. 180.

[21]Texas Jurisprudence, op. cit., p. 131.

[22]Ibid. [23]Article 15.23, C.C.P.

of their duties.[24] While each arrest involves a restraint of the person of the accused, not every detention by an officer constitutes an arrest.[25] Other methods of restraint recognized under Texas law include detention, "stop and frisk" and summons.

Detention

While detention is not defined in the Texas statutes, it is generally accepted as temporary restraint, not amounting to a full arrest, by a law enforcement officer in the proper exercise of a statutory duty. Detention is specifically authorized in incidents of shoplifting,[26] identification of witnesses[27] and when stopping a motorist to determine whether or not he possesses a valid driver's license.[28] It is also authorized for protection of the mentally ill.[29] Statutes relating to detention are discussed further in Chapter VI.

"Stop and Frisk"

The United States Supreme Court has held that a law enforcement officer may search a suspected criminal violator for weapons under circumstances indicating that the person may be armed, even though the officer may lack probable cause to make an arrest.[30] The Texas Court of Criminal Appeals has recognized the principles of "stop and frisk",

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[24]Fisher, op. cit., p. 55.

[25]Ibid.

[26]Article 1436e, P.C.

[27]Article 2.24, C.C.P.

[28]Article 6687b, R.C.S.

[29]Article 5547-27, R.C.S.

[30]Terry v. Ohio, supra.

although no Texas statute exists on the subject.[31] The problems of "stop and frisk" are covered in Chapter XI.

Summons

In the state of Texas, the summons is a notice to appear in court, issued in lieu of a warrant of arrest. It imposes no immediate physical restraint on the accused but is simply a command to appear in the future to answer a criminal charge. In some states a summons may be issued by a law enforcement officer, but in Texas it may come only from a magistrate or trial judge. The summons procedure is discussed in Chapter VI.

[31] Cox v. State 442 S.W. 2d 696 (1969); and Carter v. State, 445 S.W. 2d 747 (1969).

CHAPTER III

AUTHORITY TO MAKE ARRESTS

The authority to make arrests in Texas is strictly controlled by the State Constitution and the statutes. While some early court decisions recognized a common law power of arrest,[1] it is now well established that unless the authority to arrest falls squarely within a statutory provision, the arrest is unlawful.[2]

The United States Supreme Court has likewise held that there must be specific authority for an arrest, stating:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference, unless by clear and unquestionable authority of law.[3]

The statutes of Texas generally authorize only peace officers to make arrests, but limited arrest authority is also granted to private citizens and to specific officials such as agents of the State Comptroller, game wardens, probation and parole officers and the custodial staff of the Texas Department of Corrections. While the terms "peace officer" and "law enforcement officer" are commonly used interchangeably, the Texas Code of Criminal Procedure specifically names those persons who are "peace officers".

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[1] Pratt v. Brown 80 Tex. 608; 16 S.W. 443 (1891).

[2] Heath v. Boyd 175 S.W. 2d 214 (1943).

[3] Terry v. Ohio, supra., citing Union Pacific R.R. Co. v. Bostgord, 141 U.S. 250; 11 S. Ct. 1000 (1891).

Article 2.12 (36), C.C.P. - Who are peace officers

> The following are peace officers: The sheriff and his deputies, constables and deputy constables, marshal or police officers of an incorporated city, town or village, rangers and officers commissioned by the Public Safety Commission and the Director of the Department of Public Safety, investigators of the district attorneys, criminal district attorneys and county attorneys, each member of an arson investigating unit of a city, county or the State, law enforcement agents of the Texas Liquor Control Board, and any private person specifically appointed to execute criminal process.

Article 2.13 of the Texas Code of Criminal Procedure gives peace officers the following general duties in enforcing criminal laws and making arrests:

> It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall in every case where he is authorized by the provisions of this Code interfere without warrant to prevent or suppress crime. He shall execute all lawful process issued to him by any magistrate or court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. He shall arrest offenders without warrant in every case where he is authorized by law, in order that they may be taken before the proper magistrate or court and tried.

Article 14.05 of the Code further provides:

> In each case enumerated where arrests may be lawfully made without warrant, the officer or person making the arrest is justified in adopting all the measures which he might adopt in cases of arrest with warrant.

The Texas Court of Criminal Appeals has held that a federal law enforcement official is not a peace officer within the meaning of the Texas Code of Criminal Procedure. Any arrest made by such an official for violation of a state law will be measured by the authority of a private citizen to make an arrest in a similar case.[4] Furthermore, when acting in an official capacity, a federal officer is held accountable

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[4] McEathron v. State, 163 Tex. Cr. R. 619; 294 S.W. 2d 822 (1953).

for the use of force under the same statutes governing Texas law enforcement officers.[5]

Officers May Summon Aid

When a law enforcement officer is resisted in the lawful execution of his duty, he may summon aid from the citizenry or from other law enforcement agencies. In such instances, those so summoned have the same authority as the officer making the summons. Authority to summon aid is provided by the following statutes:

Article 2.14 (38), C.C.P. - May summon aid

> Whenever a peace officer meets with resistance in discharging any duty imposed upon him by law, he shall summon a sufficient number of citizens of his county to overcome the resistance; and all such persons summoned are bound to obey.

Article 1216, P.C. - Persons aiding officer justified

> Persons called in the aid of an officer, in the performance of a duty, are justified in the same manner as the officer himself.

Article 999b, R.C.S.

> Section 2. Any county or municipality shall have the power by resolution or order of its governing body to make provision for, or to authorize its major or chief administrative officer, chief of police or marshal to make provision for its regularly employed law enforcement officers to assist any other county or municipality when in the opinion of the major, or other officer authorized to declare a state of civil emergency in such other county or municipality, there exists in such other county or municipality a need for the services of additional law enforcement officers to protect the health, life and property of such other county or municipality, its inhabitants, and the visitors thereto, by reason of riot, unlawful assembly characterized by the use of force or violence, or threat thereof by three or more persons acting together, or without lawful authority, or during time of natural disaster or man-made calamity.

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[5]Article 1218, P.C.

Section 3. While any law enforcement officer regularly employed as such in one county or municipality is in the service of another county or municipality pursuant to this Act, he shall be a peace officer of such other county or municipality and be under the command of the law enforcement officer therein who is in charge of that county or municipality, with all the powers of a regular law enforcement officer in such other county or municipality, as fully as though he were within the county or municipality where regularly employed, and his qualifications, respectively, for office where regularly employed shall constitute his qualifications for office in such other county or municipality, and no other oath, bond, or compensation need be made.

Jurisdiction to Arrest

The law enforcement officer may normally arrest without a warrant only in his own jurisdiction or bailiwick.[6] However, he may lawfully pursue offenders from his jurisdiction and make a lawful arrest.[7]

Possession of a warrant of arrest empowers an officer to arrest outside his own jurisdiction. Sheriffs and their deputies may make arrests out of their own counties with a warrant,[8] and a city police officer may go anywhere in the county in which his city is located in order to make an arrest with a warrant.[9] Officers summoned to the aid of other officers may likewise make arrests in the jurisdiction of the officer making the summons. Otherwise, however, the authority of a peace officer outside his own jurisdiction is only that of any private citizen.[10]

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[6] Buse v. State, 435 S.W. 2d 530 (1968).

[7] France v. State, 167 Tex. Cr. R. 32; 318 S.W. 2d 72 (1958).

[8] Lloyd v. State, 143 Tex. Cr. R. 516; 169 S.W. 2d 872 (1942).

[9] Newburn v. Durham, 88 Tex. 288 (1890); and Article 999, R.C.S.; and Article 45.04, C.C.P.

[10] Buse v. State, supra.

Arrest By a Private Citizen

A private citizen has no general or common law authority to make a "citizen's arrest" in the state of Texas, and, unless specifically authorized by statute, such an arrest is unlawful.[11] The right of the private citizen to arrest is generally limited by statute to the following situations: when he is specifically appointed to execute criminal process;[12] when a felony or breach of the peace is committed in his presence;[13] when he acts to prevent the consequences of theft[14] or shoplifting;[15] when he is called to aid or assist a peace officer in the execution of his lawful duty;[16] when he acts to retake an escaped convict[17] or a fugitive from another state;[18] when he acts to prevent an offense against his person;[19] and when he acts to prevent any illegal attempt by force to take or to injure property in his lawful possession.[20] When the private citizen does make such an arrest, the statutes charge him to deliver a person so arrested to a peace officer or magistrate without unreasonable delay.[21]

Specific Authority to Certain Officials

As previously mentioned, certain public officials have specific

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[11] Heath v. Boyd, supra.
[12] Article 2.12, C.C.P.
[13] Article 14.01, C.C.P.
[14] Article 18.22, C.C.P.
[15] Article 14.36c, C.C.P.
[16] Article 2.14, C.C.P.
[17] Article 15.27, C.C.P.
[18] Article 51.13, Section 14, C.C.P.
[19] Article 5.02, C.C.P.
[20] Article 5.03, C.C.P.
[21] Article 14.06, C.C.P.

arrest authority granted by statute. These officials are not included in this study due to their comparatively small scope of authority and enforcement activity. However, peace officers should always keep in mind that these officials do have arrest authority and can be of great assistance in the areas of their responsibilities.

CHAPTER IV

CONSTITUTIONAL LIMITATION ON THE POWER TO ARREST

The constitutions of the United States and the State of Texas each contain fundamental restrictions against unreasonable or unlawful arrest, search or seizure. These restrictions constitute basic individual rights and freedoms under our system of government and establish the framework within which Congress and the State Legislature may pass statutes.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, Section 9, of the Constitution of the State of Texas contains a similar restriction on the power to arrest:

> The people shall be secure in their persons, houses, papers, and possessions, from all unreasonable seizures and searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be nor without probable cause, supported by oath or affirmation.

While most state constitutions contain similar restrictions, the United States Supreme Court has held that the constitutional protections of the Fourth Amendment apply to persons prosecuted in state courts for state violations by virtue of the "due process" clause of the Fourteenth Amendment,[1] which states:

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[1] Ker v. California, 374 U.S. 23; 83 S. Ct. 1623 (1963), citing Mapp v. Ohio, 367 U.S. 643; 81 S. Ct. 1081 (1961).

> Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court has long held the Fourth Amendment's protection to be the very essence of constitutional liberty and individual freedom.[2] However, the Court has expressly noted, ". . . what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[3] The arrest of an individual is universally deemed a "seizure" of his person.[4]

The Court has further stated, ". . . there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."[5] The term "unreasonable" is not precisely defined, either by the Constitution or by the various court decisions, but, in general, any arrest which is unlawful or unauthorized by law is unreasonable.

Although an arrest may be otherwise lawful, the seizure may become unreasonable if the conduct of the officer is improper. This would be true in the case of unwarranted abuse of a prisoner, deliberate denial of his constitutional rights or threats and intimidation toward the prisoner.[6]

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[2]Goulded v. United States, 255 U.S. 298; 41 S. Ct. 261 (1921).

[3]Elkins v. United States, 364 U.S. 206; 80 S. Ct. 1437 (1960).

[4]Terry v. Ohio, supra.

[5]Rabinowitz v. United States, 339 U.S. 56; 70 S. Ct. 430 (1950).

[6]Warden v. Hayden, 387 U.S. 294; 87 S. Ct. 1642 (1967).

In state court prosecutions, the legality of an arrest is determined by the state law as measured against the Constitutional guarantees of the Fourth Amendment.[7] It is, therefore, essential and imperative that the state or local law enforcement officer be thoroughly acquainted with the laws of his own state regarding arrests.

Probable Cause

The constitutions of the United States and the State of Texas both require probable cause for an arrest. Although neither defines the term, the United States Supreme Court has held:

> Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.[8]

The Texas Supreme Court has also set its definition of probable cause:

> . . . a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.[9]

While the wording of the definitions differs slightly, the essence is the same. Both definitions have been consistently adhered to by the courts.

These definitions contain no precise yardstick for measurement of facts. Facts which might constitute probable cause in one case could be

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[7]Ker v. California, supra.

[8]Brinegar v. United States, 338 U.S. 160; 69 S. Ct. 289 (1949).

[9]Landa v. Obert, 45 Tex. 539 (1876).

insufficient in another type of violation.[10]

The requirement of probable cause does not mean, however, than an officer must have evidence to establish beyond a reasonable doubt the guilt of an accused.[11] Probable cause is based on facts and circumstances which would be measured by the standards of a reasonable, cautious and prudent officer.[12] As the United States Supreme Court has stated:

> In dealing with probable cause . . . as the name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[13]

Mere suspicions or rumors do not constitute probable cause. They must be supported by facts.[14]

It is generally accepted that the requirement of probable cause applies with equal stringency in cases of arrest with warrant and those of arrest without warrant.[15] The facts which constitute probable cause may be based upon the statements of a victim of the crime, witnesses to the crime, upon scientific or factual investigation or upon information received from other law enforcement agencies. Determination of probable cause must be made upon facts known to the officer at the time of the

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[10] Brinegar v. United States, supra.

[11] Henry v. United States, 361 U.S. 98; 80 S. Ct. 168 (1960).

[12] Bell v. United States, 254 F 2d 82 (1958).

[13] Brinegar v. United States, supra.

[14] Wong Sun v. United States, 371 U.S. 471; 83 S. Ct. 407 (1963); and Crawford v. State, 148 Tex. Cr. R. 563; 189 S.W. 2d 871 (1945).

[15] Beck v. Ohio, 379 U.S. 89; 85 S. Ct. 223 (1964).

arrest and not upon evidence found as a result of the arrest.[16]

Informants

Statements given by informants often provide the basis for probable cause.[17] The informant must be reliable and credible, and his information must be based on fact, even though it may be hearsay.[18] The informant may be the victim of a crime, a witness to a crime or a person whose identity the law enforcement officer may protect. The identity of an informant need not be revealed to the accused unless the informant was a witness to or a participant in the crime for which the accused is charged.[19] The rule permitting an informant's identity to remain confidential is well established in the laws of evidence.[20]

An officer should always attempt to corroborate an informant's allegations with his own personal investigation whenever possible. If time permits, the information should be verified by surveillance, by the interviewing of witnesses, by scientific means or through the use of police records. This extra effort will further strengthen the requirement of probable cause.

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[16] Carroll v. United States, 267 U.S. 132; 69 S. Ct. 208 (1925).

[17] Draper v. United States, 358 U.S. 307; 79 S. Ct. 329 (1959).

[18] Ibid.

[19] McCray v. Illinois, 386 U.S. 300; 87 S. Ct. 1056 (1967).

[20] McCray v. Illinois, supra.; and Bosley v. State, 414 S.W. 2d 468 (1967) for the Texas rule.

CHAPTER V

ARREST WITH WARRANT

It is a fundamental principle of law that an officer making an arrest must, whenever practicable, obtain advance judicial approval for his action through the arrest warrant procedure.[1] This procedure interposes between the citizen and the police the deliberate, impartial judgment of a judicial officer and assesses the weight and credibility of the information which the complaining officer submits as probable cause.[2]

The Texas statutes provide ample authority and clear guidelines for the warrant procedure. Simply stated, each warrant of arrest must be issued upon a written complaint, based upon probable cause, made under oath, charging the accused with a violation of the law.[3] A warrant of arrest will issue for violation of any penal offense in the state of Texas.

Complaint

A complaint is an affidavit in writing, sworn to before an official authorized by law, charging the commission of a criminal offense. The Texas Code of Criminal Procedure defines a complaint as follows:

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[1]Katz v. United States, 389 U.S. 347; 88 S. Ct. 507 (1967); and Heath v. Boyd, supra., for the Texas rule.

[2]Wong Sun v. United States, supra.

[3]Fourth Amendment, U.S. Constitution; and Article 1, Section 9, Constitution of the State of Texas.

Article 15.04 (221), C.C.P. - Complaint

The affidavit made before the magistrate or district or county attorney is called a "complaint" if it charges the commission of an offense.

In addition to the officials named in this statute to receive a complaint. the Texas Court of Criminal Appeals has held that the complaint may be signed and sworn to before a city attorney in corporation court cases[4] or before a notary public.[5]

The printed form of the complaint varies, but the Texas Code of Criminal Procedure sets forth the following requisites:

Article 15.05 (222), C.C.P. - Requisites of complaint

The complaint shall be sufficient, without regard to form, if it have these substantial requisites:

1. It must state the name of the accused, if known, and if not known, must give some reasonably definite description of him.

2. It must show that the accused has committed some offense against the laws of the State, either directly or that the affiant has good reason to believe, and does believe, that the accused has committed such offense.

3. It must state the time and place of the commission of the offense, as definitely as can be done by the affiant.

4. It must be signed by the affiant by writing his name or affixing his mark.

In addition to these statutory requisites of the complaint, the United States Supreme Court, in the case of Barnes v. Texas, held that where evidentiary matter is seized as a result of an arrest with warrant, said warrant must be based on a complaint which states the probable

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[4]Johnson v. State, 47 Tex. Cr. R. 581; 85 S.W. 274 (1905); and Article 45.01, C.C.P.

[5]Greer v. State, 437 S.W. 2d 274 (1969).

cause for the arrest.[6] This probable cause may be based on hearsay information or on personal knowledge of the affiant, or a combination of both. However, the probable cause must be stated on the face of the complaint in a factual manner and not as a conclusion. The Court cited as its authority the case of Giordenello v. United States, which analogizes a warrant of arrest to a search warrant in those cases where evidentiary matter is seized.[7] This case recognized that a warrant of arrest based on the return of a grand jury indictment does not require a statement of probable cause, since the essence of the indictment itself is probable cause for trial of the accused.

However, the requirement of a statement of probable cause in the complaint is an evidentiary rule and affects only the admissibility of evidence seized incidental to the arrest made with a warrant. The lack of a statement of probable cause in the complaint does not otherwise bar prosecution or affect the authority of the warrant as long as probable cause does in fact exist. When no evidence is seized or offered into testimony, or where the complaint is filed as a pleading to the court to commence a criminal prosecution, no statement of probable cause is required in the complaint.[8]

Any credible person may sign a criminal complaint, a credible person being one who is legally competent to testify in a court of law.[9]

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[6]Barnes v. Texas, 380 U.S. 253; 85 S. Ct. 942 (1965).

[7]Giordenello v. United States, 357 U.S. 480; 78 S. Ct. 1245 (1958).

[8]Aguirre v. State, 416 S.W. 2d 406 (1967).

[9]Article 38.06, C.C.P.

In most criminal cases, the complaint is signed by a law enforcement officer.

The affiant need not be a witness to the offense described in the complaint but may base his allegations on the fact that he has "good reason to believe and does believe" the facts contained therein.[10] For example, the Texas Court of Criminal Appeals has held that a police sergeant may properly sign a complaint based on information received from one of his subordinates, even though the sergeant did not personally witness the offense.[11]

Warrants of Arrest

A warrant of arrest is a written order issued by a magistrate or other legally authorized official, made in the name of the State, and directed to a peace officer or some other person specially designated, commanding him to arrest and bring before the court the person named in the warrant.[12] The Texas statutes recognize four types of arrest warrant--the magistrate's warrant, the capias, the governor's warrant and the bench warrant.

Magistrate's warrant

The magistrate's warrant of arrest is described as follows:

Article 15.01 (218), C.C.P. - Warrant of arrest

A warrant of arrest is a written order from a magistrate, directed to

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[10]Griffin v. State, 137 Tex. Cr. R. 231; 128 S.W. 2d 1197 (1938).

[11]Richards v. State, 165 Tex. Cr. R. 176; 305 S.W. 2d 375 (1957).

[12]Fisher, op. cit., p. 10.

a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law.

The State of Texas declares the following officials to be magistrates and outlines their duties:

Article 2.09 (33), C.C.P. - Who are magistrates

Each of the following officers is a magistrate within the meaning of this Code: The judges of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the District Court, the county judges, the judges of the county courts at law, judges of the county criminal courts, the justices of the peace, the mayors and recorders and the judges of the city courts of incorporated cities or towns.

Article 2.10 (34). C.C.P. - Duty of magistrates

It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.

This warrant, like the complaint, varies in form with the different printers, but it must contain the following statutory requisites:

Article 15.02 (219), C.C.P. - Requisites of warrant

It issues in the name of "The State of Texas", and shall be sufficient, without regard to form, it it has these substantial requisites:

1. It must specify the name of the person whose arrest is ordered, if it be known; if unknown, then some reasonably definite description must be given of him.

2. It must state that the person is accused of some offense against the laws of the State, naming the offense.

3. It must be signed by the magistrate and his office be named in the body of the warrant, or in connection with his signature.

Capias

The capias is a writ issued from the court which has trial jurisdiction in a criminal charge, ordering the arrest of the person named in

the charge. The capias is issued after the filing of a formal criminal charge in the trial court as a process of the court to obtain jurisdiction over the person of the accused.[13] The Texas Code of Criminal Procedure defines the capias and its requisites as follows:

Article 23.01 (441), C.C.P. - Definition of a "capias"

A "capias" is a writ issued by the court or clerk and directed "To any peace officer of the State of Texas", commanding him to arrest a person accused of an offense and bring him before that court immediately, or on a day or at a term stated in the writ.

Article 23.02 (442), C.C.P. - Its requisites

A capias shall be held sufficient if it has the following requisites:

1. That it run in the name of "The State of Texas";

2. That it name the person whose arrest is ordered, or if unknown, describe him;

3. That it specify the offense of which the defendant is accused, and it appear thereby that he is accused of some offense against the penal laws of the State;

4. That it name the court to which and the time when it is returnable; and

5. That it be dated and attested officially by the authority issuing the same.

It should be noted that either a judge or the clerk of the court may sign a capias, but from a practical standpoint the authority of the magistrate's warrant and the capias are the same under Texas law. The law enforcement officer must think of the judge as "wearing two hats", or acting in a dual capacity. On the one hand he is indeed a magistrate, while he is at the same time the trial judge. The magistrate's warrant is issued in the capacity of a magistrate, and the capias is issued in the capacity of the trial judge.

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[13]Fisher, op. cit., p. 11.

Governor's warrant

The governor of the State of Texas is empowered by the Uniform Criminal Extradition Act to issue a warrant of arrest to another state or to the District of Columbia, upon proper application of the state's attorney, for the arrest of a person charged with a crime or with escaping from confinement or breaking the terms of his bail, probation or parole.[14] Such a warrant may likewise be issued for parole violation within the state. There is no form prescribed by law for this type of warrant.[15]

Bench warrant

The term "bench warrant" is not precisely defined in the Texas Code of Criminal Procedure. However, the commonly accepted definition is ". . . a process issued by the court itself from the 'bench' for the arrest of a person to compel his attendance before the court".[16] Such a warrant is normally issued in cases of contempt of court, to compel the attendance of a witness who has not obeyed a subpoena or to act as an attachment for convicts or witnesses already in custody.[17] The statutes prescribe no form for the bench warrant, and it is, in fact, usually issued in the form of a capias.

Authority of a warrant of arrest

A warrant of arrest may be served in any county of the State by

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[14]Article 51.13 (1008a), C.C.P.

[15]Section 269. P.C.

[16]Fisher, op. cit., p. 105.

[17]Article 24.13, C.C.P.

any peace officer into whose hands it may be transferred. The Texas Code of Criminal Procedure provides:

> Article 15.06 (223), C.C.P. - Warrant extends to every part of the State
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> A warrant of arrest, issued by any county or district clerk, or by any magistrate (except mayors or recorders of an incorporated city or town), shall extend to any part of the State; any peace officer to whom said warrant is directed, or into whose hands the same has been transferred, shall be authorized to execute the same in any county of this State.

However, in those cases where the warrant is issued by a mayor or recorder of an incorporated town or city, acting in the capacity of a magistrate, the warrant must be endorsed by a court of record.[18] County courts, district courts, and the appellate courts are deemed courts of record in Texas. Justice of the peace and corporation courts are not courts of record under Texas law.

The warrant may be telegraphed by one law enforcement agency to another, and, if the warrant has been properly issued by a magistrate, the agency receiving it is obligated to execute it without delay.[19] However, there is no statutory provision regarding transfer of warrants via the "teletype" machine commonly used by law enforcement agencies.

As previously noted, officers may normally arrest only within their own geographical jurisdiction or bailiwick. However, amendments to Article 45.04 of the Texas Code of Criminal Procedure and Article 999 of the Revised Civil Statutes permit officers to serve warrants of arrest anywhere in the county in which their city is located, and, if the

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[18]Article 15.07, C.C.P.

[19]Article 15.08, C.C.P.

city is located within two counties, in either county.[20] Likewise by court decision, a sheriff or his deputy may go into another county in order to make an arrest with a warrant.[21]

If possible, the arresting officer should have the warrant in his possession at the time of the arrest. However, if he does not have it, the arrest is lawful as long as the warrant has in fact been issued.

Article 15.26 (243), C.C.P. - Authority to arrest must be made known

> In executing a warrant of arrest, it shall always be made known to the accused under what authority the arrest is made. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, provided the warrant was issued under the provisions of this Code, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that the warrant has been issued.

Preparation of the Warrant

In order to be effective, the warrant of arrest must be properly prepared. Failure to comply with this rule may result in an arrest being held unlawful.

Name of the accused

The warrant must state the name of the accused if it is known. If the name is not known, then a reasonably definite physical description must be given. While in some states the term "John Doe" or a fictitious

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[20]Acts of the 60th Texas Legislature (1967), Chapter 523, Sections 1, 2 and 3, p. 1171.

[21]Lloyd v. State, supra.

name may be used in place of the accused's unknown name, such a practice voids a warrant in this state. The name should be correctly spelled, if possible, but slight variation in the spelling does not void the warrant if the names are so nearly alike as to be held idem sonans--such as Johnson and Johnston, or Smith and Smythe. However, the warrant is defective if the accused's first name is incorrect. An officer may not add to or correct a name after the warrant's issuance. A defect may be corrected only by the official or magistrate having issuing authority. Any change or insertion by the officer renders the warrant null and void.[22]

It has been held by the Texas Supreme Court that a person may not be lawfully arrested merely because he happens to have the same name as that which appears on the warrant. If an arrest is made, even though innocently on the part of the officer, when circumstances would seem to have indicated possible error, the officer is liable in civil court for damages to the person wrongfully arrested.[23] However, if the officer is led to believe by the statements of the apprehended party that he is indeed the person named in the warrant, the arrest is justified.[24]

Offense charged

The warrant must state the offense charged. No exact wording is required, but it should be sufficiently definite to allow the accused to

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[22]Newburn v. Durham, supra.

[23]Wolf v. Perryman, 17 S.W. 772 (1891).

[24]Landrum v. Wells, 26 S.W. 100 (1894).

know the offense with which he is being charged. Warrants which state only "a felony" or "the offense of a misdemeanor" are invalid.[25]

Official signature

The magistrate or other official authorized by law to issue the warrant must sign it, stating his official capacity. The facsimile stamp of a justice of the peace is valid when affixed to an affidavit or warrant.[26]

Execution and Return of the Warrant

A warrant of arrest is said to be "executed" when the accused has in fact been arrested.[27] The arresting officer is then charged with the duty of taking the arrested person, without delay, before a magistrate in the county where the arrest was made.[28] It is preferable that the magistrate be the one who issued the warrant or the judge from whose court a capias issued, but the statutes require only that he be in the county where the arrest is made. A more complete discussion of disposition procedures following arrest will be found in Chapter IX.

Once the accused has been taken before a magistrate and has been placed in jail or posted bond, the arresting officer must then endorse the "return" section on the back of the warrant. This section normally provides space for the date upon which the warrant came into the hands

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[25]Ellis v. Glasgow, 168 S.W. 2d 946 (1943).

[26]Stork v. State, 114 Tex. Cr. R. 398; 23 S.W. 2d 733 (1929).

[27]Article 15.23, C.C.P.

[28]Article 15.17, C.C.P.

of the arresting officer and the date upon which the warrant was executed. The officer also notes on the return the disposition of the arrested person, after which he returns the warrant to the issuing authority. While a defectively executed return will not affect the legality of the arrest with warrant, the officer should always carry out this procedure, as he would any court process, with solemnity and care, aware that slovenly action may be used later to discredit his testimony before a jury.[29]

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[29] Young v. State, 398 S.W. 2d 572 (1965).

CHAPTER VI

ARRESTS WITHOUT WARRANT

The federal courts and those of the State of Texas have always favored and encouraged use of the warrant procedure in making arrests,[1] reasoning that advance judicial approval of probable cause places the decision for the arrest in reliable hands. This, in turn, relieves the law enforcement officer of responsibility for possible ill-advised or rash action.[2]

The early common law, the Congress of the United States, and the Legislature of the State of Texas all recognize the impracticability of requiring that each arrest be made with a warrant. Thus, each legislative body has enacted laws permitting arrest without warrant in certain situations. It is well settled, however, that an arrest may be made without a warrant in Texas only when there is express statutory authority, and, unless such an arrest falls squarely within a statutory provision, it will be held unlawful.[3]

The arrest statutes are based on the practical necessity for prompt law enforcement action in some instances. The United States Supreme Court has stated, ". . . failure to comply with the warrant requirement can only be excused by exigent circumstances."[4] Because

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[1]Davis v. Mississippi, 395 U.S. 93; 89 S. Ct. 1394 (1969).

[2]Fisher, op. cit., p. 100. [3]Heath v. Boyd, supra.

[4]Terry v. Ohio, supra.; and Carroll v. U.S., supra.

officers working on the street must frequently arrest without warrant, their full understanding of all the statutes authorizing such arrests is an absolute necessity.

Unfortunately, the Texas statutes authorizing arrest without warrant are a virtual "hodge-podge", located variously in the Penal Code, the Code of Criminal Procedure, and the Revised Civil Statutes. In this Chapter, all pertinent rules are set out and the major court decisions interpreting them reviewed. The statutes are arranged according to the writer's personal experience as to their relative importance to the working officer. However, it is important that the officer be familiar with all such statutes if he is to perform as a true professional.

Offenses Committed Within Presence or View of the Officer

Article 14.01 (212), C.C.P. - Offense within view

(a) A peace officer or any other person may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

The first section of this statute permits a peace officer or "any other person", meaning the private citizen, to make an arrest for any offense classed as a felony or breach of the peace if the offense is committed in his presence or within his view. In Texas, a felony is any offense which has as a possible penalty death or penitentiary confinement. Breaches of the peace include all offenses under Title 9 of

the Penal Code, "Offenses Against the Public Peace".[5] The more common offenses thus classified include affrays, disturbing the peace, public drunkenness, peddler's refusing to leave, shooting in public places or across or along public roads, and abusive language. (It should be noted that not all misdemeanors are automatically breaches of the peace.)

Judge Davidson of the Texas Court of Criminal Appeals handed down the following definition of a breach of the peace:

> The term "breach of the peace" is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community; a disturbance of the public tranquility by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm disturbs the peace and quiet of the community. By "peace", as used in this connection, is meant the tranquility where good order reigns among its members. Breach of the peace is a common-law offense, yet it may be, and at times is, recognized as such by statute or otherwise; and only when so regarded will it be considered in this article.
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> The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet, of an invasion of the security and protection which the laws afford to every citizen, or of acts such as tend to incite violent resentment or to provoke or excite others to break the peace. Actual or threatened violence is an essential element of breach of the peace. Either one is sufficient to constitute the offense. Accordingly, where means which cause disquiet and disorder, and which threaten danger and disaster to the community, are used, it amounts to a breach of the peace, although no actual violence is employed. Where the incitement of terror or fear of personal violence is a necessary element, the conduct or language of the wrongdoer must be of a character to induce such a condition in a person of ordinary firmness.[6]

The second section of Article 14.01 (added by the 1967 Legislature) authorizes the peace officer to arrest for any offense which occurs

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[5] McEathron v. State, supra.

[6] Woods v. State, 152 Tex. Cr. R. 338; 96 S.W. 2d 981 (1948).

within his presence or view. This would, of course, include felonies, but it would also cover all misdemeanors, whether or not they involve a breach of the peace. In the case of a city policeman, it would include violations of city ordinances.

The term "in his presence or within his view", as used in this statute, has been held to signify that an arrest may be made without a warrant when the officer detects the offender by sight or hearing by reason of what he said or did.[7] Thus, if an officer is apprised by any of his senses that a crime is being committed, he is justified in arresting without a warrant.[8]

The officer making such an arrest must be in such close proximity to the offense that he can detect its commission. It is insufficient that he is in a position so that the commission of the offense might have come to his attention. The test would seem to be that he should have probable cause, based upon his detection of the actual commission of the act. Certainly, his personal view of an offense is sufficient.

Persons Found in Suspicious Circumstances

Article 14.03 (214) - Authority of peace officers

Any peace officer may arrest, without warrant, persons found in suspicious places or under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws.

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[7] Texas Jurisprudence, op. cit., p. 155.

[8] Clark v. State, 117 Tex. Cr. R. 153; 35 S.W. 2d 420 (1931).

The authority to arrest persons found in suspicious circumstances has been a part of Texas law from the earliest date. Until 1967, only officers of municipalities were authorized to make this type of arrest, but all Texas law enforcement officers may now do so.

The Code of Criminal Procedure does not define "suspicious places or circumstances", but the Texas Court of Criminal Appeals has universally held that there must be probable cause for this type of arrest. Suspicion alone will not suffice.[9] While no formula exists for determination of probable cause necessary for arrest under such circumstances, the best guideline from the Court seems to require suspicious circumstances plus some unusual act on the part of the accused to bolster the officer's belief that some violation of the law has occurred.[10] A brief review of pertinent court decisions will serve to illustrate circumstances justifying arrest under this statute.

Pertinent court decisions

Horrell v. State, 124 Tex. Cr. R. 84; 61 S.W. 2d 108 (1933).

A man was shot to death at 9:30 p.m. There were no eyewitnesses, and the crime was reported by a citizen who heard the shots. The body was found by the officer answering the call. The following morning, approximately twelve hours after the crime, the officer saw two men walking on the street near the scene. He knew that one had previously been handled for robbery. The other was carrying a package. The officer followed the men, who attempted to evade him, and he arrested them after following for some time. During the search incidental to the arrest, the officer seized the package, which revealed the pistol used in the crime. On the person of one of the men was found a towel which had been used as a mask during the crime. The arrest was upheld under Article 214, C.C.P. The evidence seized was therefore held admissible.

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[9] Giacona v. State, 164 Tex. Cr. R. 325; 298 S.W. 2d 587 (1957).

[10] Thomas v. State, 163 Tex. Cr. R. 68; 288 S.W. 2d 791 (1956).

Purdy v. State, 159 Tex. Cr. R. 154; 261 S.W. 2d 850 (1953).

A waitress reported to the officer that there had been a breach of the peace and identified the defendant as the person who had caused the trouble. The arrest was held to be "under circumstances reasonably showing that they have been guilty of breach of the peace, or threaten or are about to commit some offense", even though the offense was not witnessed by the officer.

Barnes v. State, 161 Tex. Cr. R. 510; 278 S.W. 2d 305 (1954).

An officer observed a car parked beside a closed pharmacy. When passing again later, he observed two men enter the car and drive away. This constituted sufficient probable cause for arrest under suspicious circumstances, and subsequent search of the car, in which a bomb was found, was also held to be lawful.

Mason v. State, 160 Tex. Cr. R. 501; 272 S.W. 2d 527 (1954).

Officers saw two white men in a Negro neighborhood at 2 a.m., carrying boxes. The men acted strangely at the officers' approach, and examination of the boxes revealed sixty packages of cigarettes, a radio and some book matches imprinted with the name of a cafe. The officers returned with the men to the cafe and discovered that it had been burglarized. Arrest under suspicious circumstances was upheld and the items taken in the burglary admitted in evidence.

Ringo v. State, 161 Tex.Cr. R. 93; 275 S.W. 2d 121 (1954).

Officers observed a car leaving a tavern at 1:30 a.m., driving on the wrong side of the road without headlights. Upon stopping the car, the officers found that the occupants had no identification and had been unemployed since entering the state. Radio check revealed the car to be registered to another person, constituting sufficient authority for arrest under suspicious circumstances. Subsequent search and discovery of marijuana were held lawful.

Edwards v. State, 344 S.W. 2d 687 (1961).

Officers making a rape investigation received information from the victim as to the suspect's physical description, dress and car. Checking the service station where the suspect was employed, the officers found that both the suspect and his auto matched the description given by the victim. The suspect was arrested without warrant, and search of the car revealed a pistol and other evidence of the crime. The arrest was held lawful under the section of the city ordinance which stated, ". . . any person or persons found under circumstances reasonably tending to show that such person has been guilty of some felony . . ."

McCutcheon v. State, 158 Tex. Cr. R. 419; 375 S.W. 2d 175 (1964).

An officer observed two men leaving a cleaning establishment. As he approached, the men threw something over a hedge. Search revcaled two shirts taken in a burglary of the cleaner's. Such conduct justified arrest and subsequcnt prosecution for burglary.

Saldana v. State, 383 S.W. 2d 599 (1964).

Two cabins in a tourist court had been under surveillance after one had previously been searched and its occupant charged with possession of narcotics paraphernalia. Upon observing a taxicab enter the court at 3 a.m., the officer shined a light into the car and found the defendant attempting to stuff something under the front seat. This constituted probable cause for arrest, with subsequent search revealing marijuana.

Roach v. State, 398 S.W. 2d 560 (1966).

Officers observed the defendant lingering in a dark alley at 4:30 a.m., adjusting his clothing and trying to hide something within it. He was arrested and loot from a burglary found in his possession. Arrest was upheld based on the circumstances under which the defendant was observed.

Denham v. State, 428 S.W. 2d 814 (1968).

Officers observed the defendant behaving suspiciously near a coin-operated newstand. As they approached, he fled in his car at high speed. Upon arrest, burglary tools were found in open view in the car, and coins from the robbery were found on the defendant's person. The arrest was upheld due to suspicious circumstances.

Sanchez v. State, 438 S.W. 2d 563 (1969).

An officer observed a car parked beside a warehouse at 1:30 a.m. and saw a broken window in the building. As he approached, the defendant and another man ran toward the car. The defendant was arrested and found to be in possession of marijuana. The arrest and scizure were upheld under Article 14.03.

As these cases illustrate, the Court of Criminal Appeals has been relatively liberal in upholding arrests under Article 14.03 in a wide variety of circumstances. It should be noted that there is no statutory requirement that such arrests take place only at night--they are just as proper during the daylight hours so long as suspicious circumstances or actions are present.

This statute is an essential tool of the law enforcement officer, and its authority must never be abused by arresting without probable cause. Unfortunately, there seems to be an "old wives' tale" which leads many officers to believe that they are authorized to arrest for "investigation" or to detain a suspect for seventy-two hours.[11] In its last term, the United States Supreme Court specifically condemned arrests made solely for purposes of "investigation", without probable cause.[12]

Special Authority for Officers of Towns and Cities

The Revised Civil Statutes give special authority to police officers of incorporated towns and cities:

> Article 999 (809), R.C.S. - Marshal, duties, etc.
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> The Marshal of the city shall be Ex Officio Chief of Police and may appoint one or more deputies, which appointment shall only be valid upon the approval of the City Council. Said Marshal shall, in person or by deputy, attend upon the Corporation Court while in session, and shall promptly and faithfully execute all writs and process issued from said Court. For the purpose of executing all writs and processes issued from the Corporation Court, the jurisdiction of the Marshal extends to all boundaries of the County in which the Corporation Court is situated. If the Corporation Court is in a city which is situated in more than one county, the jurisdiction of the Marshal extends to all those counties. He shall have like power with the Sheriff of the County, to execute warrants; he shall be active in quelling riots, disorders and disturbances of the peace within city limits and shall take into custody all persons so offending against the peace of the city and shall have authority to take suitable and sufficient bail for the appearance before the Corporation Court of any person charged with an offense against the ordinances or laws of the city. It shall be his duty to arrest, without warrant, all violators of the public peace and all who obstruct or interfere with

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[11] Joseph A. Varon, Searches, Seizures and Immunities, Indianapolis: The Dobbs-Merrill Co., 1961, p. vii.

[12] Davis v. Mississippi, supra.

> him in the execution of the duties of his office or who shall be guilty of any disorderly conduct or disturbance whatsoever; to prevent a breach of the peace or preserve quiet and good order, he shall have the authority to close any ballroom, theater or other place or building of public resort. In the prevention and suppression of crime and arrest of offenders, he shall have, possess and execute like power, authority and jurisdiction as the Sheriff. He shall perform such other duties and possess such other powers and authority as the City Council may by ordinance require and confer, not inconsistent with the Constitution and laws of this State . . . .

The Legislature seemingly has always permitted officers of towns and cities more liberal arrest authority. This statute provides broad authority for the arrest of persons who are guilty of breaches of the peace or disorderly conduct within the confines of a town or city and specifically permits execution of warrants of arrest anywhere in the county in which the city is located. The statute also makes it a duty, not a mere privilege, for the officer to arrest without warrant all persons violating the provisions thereof.

The Texas Court of Criminal Appeals has upheld arrests for vagrancy under this rule by concluding that vagrancy is a form of disorderly conduct, even though there may be no breach of the peace. The Court noted that vagrancy has been declared unconstitutional in some jurisdictions but stated that such a charge would be upheld until pronounced unconstitutional by the United States Supreme Court.[13]

Prevention of the Consequences of Theft

Article 18.22 (32?), C.C.P. - Preventing consequences of theft

All persons have a right to prevent the consequences of theft by

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[13]Korn v. State, 402 S.W. 2d 730 (1966).

seizing any personal property which has been stolen, and bring it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay.

Under this Article all persons, private citizens as well as peace officers, have arrest authority. Furthermore, the value of the stolen property is immaterial. Arrest is authorized for any type of theft, be it misdemeanor or felony.

Pertinent court decisions

Hepworth v. State, 111 Tex. Cr. R. 300; 12 S.W. 2d 1018 (1929).

An officer was informed that a person fitting the description of the defendant was seen with recently stolen goods. The arrest and subsequent recovery of the goods, without warrant, was authorized.

Phoenix v. State, 112 Tex. Cr. R. 491; 17 S.W. 2d 829 (1929).

When the owner of property reported to an officer that he had seen the defendant with the property in his possession, an arrest without warrant was justified.

Ringo v. State, 161 Tex. Cr. R. 93; 275 S.W. 2d 121 (1955).

The defendant's car was stopped because of suspicious circumstances. Radio check by the officer revealed the car to be registered to a person other than the defendant. This situation authorized arrest under both this Article and Article 14.03 (214), C.C.P.

Converse v. State, 386 S.W. 2d 283 (1965).

Officers were notified by radio of a theft and given a description of the thief's car. They arrested the defendant some two hours later, in the car, and recovered the stolen property in a search of the car incidental to the arrest. The court upheld the legality of the arrest, stating, "The arrest of the occupant and the search of the automobile in flight from the scene of the theft was admissible."

Tawater v. State, 408 S.W. 2d 122 (1966).

When the officer found the defendant in possession of stolen property, arrest without warrant was justified.

Dodd v. State, 436 S.W. 2d 149 (1969).

While attempting to stop the defendant for a traffic violation, the officer received radio information that he was wanted for theft. The vehicle was searched incidental to the arrest, and stolen merchandise was found.

Prevention of the Consequences of Shoplifting

Under Texas law, shoplifting is close kindred to theft, and the two crimes are virtually overlapping in some areas. The value of the stolen property is immaterial, and some acts are specifically classified as shoplifting alone. Article 1436 e of the Texas Penal Code provides:

Prevention of consequences of shoplifting

Section 2. All persons have a right to prevent the consequences of shoplifting by seizing any goods, edible meat or other corporeal property which has been so taken, and bring it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the crime of shoplifting to have been committed and the property so taken, and the seizure must be openly made and the proceedings had without delay.

Detention of persons

Section 3. Any merchant, his agent or employee, who has reasonable ground to believe that a person has wrongfully taken or has wrongful possession of merchandise, may detain such a person in a reasonable manner and for a reasonable length of time for the purpose of investigating the ownership of such merchandise. Such reasonable detention shall not constitute an arrest, nor shall it render the merchant, his agent or employee liable to the person detained.

When Informed of a Felony

Article 14.04 (215), C.C.P.

Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

This statute concerns felony cases only and contains no authority to arrest for misdemeanors. All felonies are covered, regardless of the nature of the offense.

It is well established that an arresting officer may receive information in person from a complainant or witness or by telephone or radio broadcast.[14] It is not necessary that the officer personally witness the commission of the offense or that it occur within his view. This Article is based upon necessity, and, unless the suspect is indeed about to flee, leaving insufficient time to secure a warrant, arrest cannot be justified. In Butler v. State, the defendant was arrested in his home two days after a burglary. The officers possessed no warrant for the arrest or for a search. The Texas Court of Criminal Appeals held that the arrest and subsequent seizure of evidence two days after the commission of the burglary were unlawful.[15]

The United States Supreme Court has similarly held that there must be some information that a suspect is about to escape in order to justify an arrest without warrant under this statute.[16]

Pertinent court decisions

Rickman v. State, 138 Tex. Cr. R. 193; 134 S.W. 2d 668 (1940).

An officer was informed that the defendant had committed a robbery and had forced a taxi driver to take him to another city. During the arrest for this offense, the defendant shot and killed the officer. In upholding the legality of the arrest, the Court of Criminal

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[14]Harris v. State, 435 S.W. 2d 502 (1968).

[15]Butler v. State, 151 Tex. Cr. R. 244; 208 S.W. 2d 89 (1947).

[16]Ward v. Texas, 316 U.S. 547; 62 S. Ct. 1139 (1942).

stated, "The testimony shows that the deceased was informed that (the defendant) had committed a felony and that the deceased was acquainted with him, and that he was a fugitive from such felony. If that be true, and surely if he knew (the defendant), he recognized him when he saw him in the car, then under Article 215, Texas Code of Criminal Procedure, he would have the right to pursue and to arrest the accused."

Tunnell v. State, 168 Tex. Cr. R. 358; 327 S.W. 2d 590 (1959).

Information received by a deputy sheriff as to a robbery, together with a description of the suspects' auto, was sufficient to justify arrest of the defendant and his companions without a warrant. Search incidental to the arrest was also held lawful.

Gonzales v. State, 379 S.W. 2d 352 (1964).

An officer received information from a confidential source that the defendant had purchased marijuana and was preparing to leave the city on a bus. The officer immediately proceeded to the bus station and observed the defendant preparing to board a bus. The arrest and subsequent search of the defendant's person were justified.

Harris v. State, 435 S.W. 2d 502 (1968).

Officers received a radio report of an armed robbery and a description of the suspects. As they approached the scene of the crime, they saw the defendant and two other men answering the descriptions running from a field with mud on their feet. The men were arrested and found to have in their possession the money taken in the robbery and the pistol used in the crime. The Court of Criminal Appeals upheld the arrest and seizure of the evidence.

Arrest on Verbal Order

Article 14.02 (213), C.C.P. - Within view of magistrate

A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate verbally orders the arrest of the offender.

This Article merely gives a magistrate the same authority to order the arrest of an offender who commits a felony or breach of the peace in his presence. He has no authority under this Article to verbally order

the arrest of a person who commits a misdemeanor not amounting to a breach of the peace or an offense not committed in his presence or view. The Texas Court of Criminal Appeals has held:

> The mayor of an incorporated town or city is a magistrate with authority to verbally order the arrest of one who commits a breach of the peace within his view or presence, and a peace officer who is so ordered may lawfully arrest such an offender without warrant.[17]

Escaped Prisoners

Article 15.27 (244), C.C.P. - Escaped prisoner

> If a person arrested shall escaped, or be rescued, he may be retaken without any other warrant; and, for this purpose, all the means may be used which are authorized in making the arrest in the first instance.

In arresting an escaped prisoner, the officer is, in reality, merely retaking him. This Article applies to all types of prisoners, no matter what the offense. Furthermore, it does not matter whether the prisoner was originally arrested under a warrant or was formally charged with an offense. As long as the first arrest was lawful, the prisoner may be retaken. The Texas Court of Criminal Appeals has ruled that a private citizen may also arrest an escaped convict under this Article.[18]

Prohibited Weapons

Chapter 4, Title 9, of the Texas Penal Code provides the following authority for arrest without warrant of persons in possession of certain prohibited firearms and other weapons:

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[17] Pritchett v. State, 152 Tex. Cr. R. 432; 214 S.W. 2d 623 (1948).

[18] Stephens v. State, 147 Tex. Cr. R. 510; 182 S.W. 2d 707 (1944).

Article 487, P.C. - Arrest without warrant

> Any person violating any article of this Chapter may be arrested without warrant by any peace officer and carried before the nearest justice of the peace . . . Any peace officer who shall fail or refuse to arrest such person on his own knowledge or upon information from some reliable person, shall be fined not exceeding five hundred dollars ($500). Acts 1871, p. 26.

The Texas Penal Code also specifies which weapons may not be carried on or about the person:

Article 483, P.C. - Unlawfully carrying arms

> Any person who shall carry on or about his person, saddle, or in his saddlebags, or in his portfolio or purse, any pistol, dirk, dagger, sling-shot, blackjack, hand chain, night stick, pipe stick, sword cane, spear, knuckles made of any metal or any hard substance, bowie knife, switch-blade knife, spring-blade knife, throw-blade knife, a knife with a blade over five and one-half ($5\frac{1}{2}$) inches in length, or any other knife manufactured or sold for the purpose of offense or defense, shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), or by confinement in jail for not less than one (1) month nor more than one (1) year. As amended Acts 1957, 55th Leg., Chap. 340, p. 806.

It should be emphasized that officers have a duty to arrest persons in possession of these weapons. It is immaterial whether the weapon is concealed or in open view. The law is violated if the weapon is carried "on or about" the person, and this includes weapons carried in automobiles.[19]

Pertinent court decisions

Gray v. State, 382 S.W. 2d 481 (1964).

> After being involved in an automobile collision, the defendant was arrested for carrying a pistol in her car. She contended that the fact that she was carrying a large amount of money after closing her

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[19] Allen v. State, 158 Tex. Cr. R. 666; 259 S.W. 2d 481 (1964).

business should constitute an exception to Article 484. The Court of Criminal Appeals rejected this contention, stating, "The Court was not bound to accept the testimony of the appellant and her friend and it is apparent from his findings of guilty that he did not do so . . . the evidence is sufficient to support a conviction."

Porter v. State, 388 S.W. 2d 422 (1965).

When arrested near his home for carrying a pistol, the defendant claimed he had left the house after a disturbance with his girlfriend and was on his way to call police. He contended that these facts constituted an exception to Article 484, but the Court of Criminal Appeals rejected the claim, holding, ". . . it is not required to believe the defendant's testimony as to his reason for carrying the pistol, even if it is not controverted."

Cox v. State, 442 S.W. 2d 696 (1969).

An officer received information from a credible person that the defendant was in possession of a pistol. As the officer approached, he observed a bulge in the defendant's clothing. He searched the defendant, finding a pistol, and the arrest was upheld based on Article 487, P.C., and Terry v. Ohio, supra.

Title 18 of the United States Code makes the possession of certain weapons a felony under federal law. These weapons included sawed-off shotguns, sawed-off rifles, "zip" guns, machine guns and automatic rifles. Since violation of this federal rule constitutes a felony, an officer has the right to arrest as he would in any other felony where he has authority.

Narcotics Violations

The Texas Uniform Narcotic Drug Act gives law enforcement officers special permission to search for narcotic drugs without a warrant:

Article 725-B, Section 15, P.C.

Officers and employees of the Department of Public Safety and all other peace officers who have authority to and are charged with the duty of enforcing the provisions of this act shall have power and authority, without warrant, to enter and examine any buildings, vessels, cars, conveyances, vehicles or other structures or places, when they have reason to believe and do believe that any or either

> of the same contains narcotic drugs manufactured, bought, sold, shipped or had in possession contrary to any of the provisions of this act, or that the receptacle containing the same is falsely labeled, except when such building, vessel or other structure is occupied and used as a private residence, in which event a search warrant shall be procured as herein provided.

This statute gives the officer broad authority to make searches for narcotic drugs but includes no authority to search a private residence. Search of a residence may be made only with a lawful search warrant or warrant of arrest or with the consent of the owner or legal resident. It should also be emphasized that the statute does not justify arrest of narcotics violators, only the search for narcotics.[20] Arrest without warrant in such cases still requires probable cause, the test for which in narcotics cases is two-fold: (1) information that the accused person is in possession of narcotics, plus (2) some overt incriminating act on the part of the accused.[21] The United States Supreme Court has upheld arrests without warrant for narcotics violations where probable cause existed at the time of arrest.[22]

Pertinent court decisions

French v. State, 162 Tex. Cr. R. 48; 284 S.W. 2d 359 (1955).

> Officers received information that the accused was handling marijuana. While observing another arrest, the officers saw the defendant flee the scene and gave chase. They arrested him and recovered three marijuana cigarettes. The Court of Criminal Appeals held that the information, plus the incriminating act, constituted probable cause for arrest, affirming the conviction.

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[20] Giacona v. State, supra.

[21] Thomas v. State, supra.

[22] Ker v. California, supra.

Sanders v. State, 166 Tex. Cr. R. 293; 312 S.W. 2d 640 (1958).

Officers received information that the accused was in possession of marijuana. They were told where he could be found and what he was wearing. Acting on this information, the officers found the accused walking on a street near the one named, dressed as described. As they approached, he wrapped his cigarette in paper and put it in his pocket. Arrest and search revealed the cigarette to be marijuana. In affirming the conviction, the Court of Criminal Appeals stated, "We overrule the appellant's contention that the arrest and search were unlawful. The credible information plus the unusual act of the appellant were sufficient to lead the officers to believe that a felony was being committed in their presence and to authorize arrest without a warrant."

Rangel v. State, 444 S.W. 2d 924 (1969).

A credible informant advised officers that the defendant had heroin in her possession, had sold some and was about to flee. Officers who knew the defendant found her at the location named by the informant. These facts constituted probable cause for arrest without warrant.

Lawful arrests for other offenses have been upheld as being sufficient basis for search and seizure and subsequent prosecution for possession of narcotic drugs. These offenses include speeding,[23] driving while intoxicated,[24] public drunkenness,[25] and arrests made under Article 14.03, C.C.P., of persons found in suspicious circumstances.

Gambling Violations

Gambling violations are covered by special statutes. Such violations must occur in the presence of a law enforcement officer to justify

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[23]Brown v. State, 159 Tex. Cr. R. 306; 263 S.W. 2d 261 (1954).

[24]Richardson v. State, 163 Tex. Cr. R. 585; 294 S. W. 2d 844 (1956).

[25]Hardin v. State, 387 S.W. 2d 60 (1965).

him in making an arrest without a warrant.

Bookmaking

Article 652-A of the Texas Penal Code covers several violations, including both felony and misdemeanor grades of gambling by bookmaking:

Article 652-A, Section 10, P.C.

> It shall be the duty of all peace officers and all other officers named in this Act to arrest without warrant any and all persons violating any provision of this Act, whenever such violation shall be committed within the view of such officer or officers.

Betting on dog races

Article 646-A, Section 5, of the Penal Code authorizes all peace officers to arrest without warrant any and all persons engaged in betting on dog races. Dog racing and the raising of dogs for racing purposes are not prohibited by law, but betting in Texas on the results of dog races, whether held in the state or elsewhere, is illegal.[26]

Policy games

Article 642-C, Section 8, of the Penal Code authorizes officers to arrest without warrant any and all persons engaged in keeping, exhibiting or operating a policy game.

Juveniles

An officer may arrest a juvenile offender under any condition justifying the arrest of an adult. A juvenile may also be arrested for violation of any law or city ordinance, whether felony or misdemeanor,

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[26] Reed v. Fulton, 384 S.W. 2d 173 (1964).

and he may be arrested when he is a fugitive from his parents or when his health, welfare or morals are endangered.

Article 2338-1, Sec. 11, R.C.S.

> Any peace officer or probation officer shall have the right to take into custody any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, welfare, or morals.

The juvenile offender has the same constitutional rights as do adults insofar as protection against false arrest and unreasonable seizure are concerned. State law requires that arrested juveniles be kept separate from adult offenders during periods of incarceration, and most law enforcement agencies have detailed standard operating procedures regarding the arrest, booking and disposition of juvenile offenders.

Article 5143d, Sec. 29, R.C.S.

> A boy or girl committed to the Youth Council as a delinquent child and placed by it in any institution or facility, who has escaped therefrom, or who has been released under supervision and broken the conditions thereof, may be arrested without warrant by a sheriff, deputy sheriff, constable, police officer, or parole officer employed or designated by the Youth Council, and may be kept in custody in a suitable place and there detained until such boy or girl may be returned to the custody of the Youth Council.

Fugitives From Other States

Fugitives from justice from other states or from the District of Columbia may be arrested without warrant by authority of the Texas Uniform Criminal Extradition Act.

Article 51.13 (1008a), Sec. 14, C.C.P. - Arrest without warrant

> The arrest of a person may be lawfully made also by any peace officer or private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge

or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

The officer must have reasonable information that the person to be arrested is charged with a felony or serious misdemeanor in the foreign jurisdiction. There is no authority for arrest of a fugitive charged with a minor misdemeanor.

Liquor Law Violations

The Texas Liquor Control Act has special provisions authorizing seizure of contraband. It also provides for arrest without warrant of persons who violate the Act.

Article 666-4, Sec. C, P.C.

Any alcoholic beverage possessed in violation of this Section is declared to be an illicit beverage and may be seized without warrant to be used as evidence of a violation of law, and any person in possession thereof or who otherwise violates any provision of this Section may be arrested without warrant.

Article 666-42, P.C.

All illicit beverages as defined by this Act, together with the containers and any devices in which the beverage is packaged, and any wagon, buggy, automobile, water or aircraft, or any other vehicle used for the transportation of any illicit beverage, or any equipment designed to be used or which is used for illicit manufacturing of beverages, or any material of any kind which is to be used in the manufacturing of illicit beverages, may be seized with or without a warrant by an agent or employee of the Texas Liquor Control Board, or by any peace officer, and any person found in possession or in charge thereof may be arrested without a warrant.

This statute authorizes the seizure of property used to violate the liquor laws. It further authorizes arrest without warrant of persons found to be in charge of such property. All peace officers are empowered to arrest without warrant those persons who violate statutory clauses of the Texas Liquor Control Act, including the prescribed acts

of omission or commission, in their presence or view, even though it be for a misdemeanor.

The officer must have probable cause to make an arrest, search or seizure under these articles. Facts or information must be secured before the arrest is made in order for the evidence found to be construed as admissible by the court.

The basic statutes empower the Texas Liquor Control Board to set up rules and regulations and to take administrative action against license holders for violations. Law enforcement officers may not arrest for violation of these administrative regulations.

Suppression of Riots

The Texas Penal Code, in Title 9, Chapters 1 and 2, sets out specific acts which constitute unlawful assembly or riot:

Article 439, P.C. - Unlawful assembly

> An "unlawful assembly" is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof.

Article 455, P.C. - Riot

> If the persons unlawfully assembled together do or attempt to do any illegal act, all those engaged in such illegal act are guilty of riot.

Riots usually begin as disturbances, followed by unlawful assembly, and become classified as riots when the persons assembled begin an unlawful act. Disturbances, unlawful assemblies and riots all constitute offenses against the public peace, and an officer may arrest without a warrant for any of these offenses which occur within his presence or

view.[27] Further authority to suppress such unlawful acts is given in Chapter 8, "Suppression of Riots and Other Disturbances", of the new Code of Criminal Procedure.

Article 8.04 (98), C.C.P. - Dispersing riot

Whenever a number of persons are assembled together in such a manner as to constitute a riot, according to the penal law of the State, it is the duty of every magistrate or peace officer to cause such persons to disperse. This may either be done by commanding them to disperse or by arresting the persons engaged, if necessary, either with or without a warrant.

Article 8.06 (100), C.C.P. - Means adopted to suppress

The officer engaged in suppressing a riot and those who aid him are authorized and justified in adopting such measures as are necessary to suppress the riot, but are not authorized to use any greater degree of force than is required to accomplish that object.

Article 8.07 (101), C.C.P. - Unlawful assembly

The Articles of this Chapter relating to the suppression of riots apply equally to unlawful assembly and other unlawful disturbances, as defined by the Penal Code.

The Penal Code makes it a duty for a magistrate or peace officer to disperse unlawful assemblies and riots:

Article 472, P.C. - Duty of officers in case of riot

If any persons shall be unlawfully or riotously assembled together, it is the duty of any magistrate or peace officer, so soon as it may come to his knowledge, to go to the place of such assembly and command the persons assembled to disperse; and all who continue to be unlawfully assembled or engaged in a riot after being warned to disperse shall be punished by the addition of one-half the penalty to which they would otherwise be liable if no such warning had been given.

Disloyalty

Under the Texas Penal Code, officers are authorized to arrest

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[27]Article 14.01, C.C.P.

persons who violate the following Articles: Article 152, "Insult to the United States Flag"; Article 153, "Disloyalty in Writing"; Article 154, "Possessing Flag of Enemy"; and Article 155, "Disloyal Language". The last three statutes apply only in time of war.

Traffic Violations

The traffic laws of the state of Texas are found in two separate enactments: The Texas Penal Code, Title 13, Chapter 1, Articles 783 to 803; and the Uniform Act Regulating Traffic on Highways, Article 6701d, Revised Civil Statutes.

The Texas Penal Code

Article 803, which was enacted by the Legislature in 1917, shortly after the automobile first became popular, authorizes arrest without warrant for offenses listed in Title 13, Chapter 1, including:

Article 783	Obstruction of navigable streams
784	Obstruction of public road, street, etc.
784-1	Fishing from public road or bridge
787	Obstruction of railway crossing
792	Violation of promise to appear
795	Racing
796	Horn
797	Prevent unusual noise, etc.
798	Lights
799	Brakes
801	Law of the road
802	Driving while intoxicated

Article 803, P.C.

Any peace officer is authorized to arrest without warrant any person found committing a violation of any provision of the preceding articles of this chapter.

Article 792, P.C.

In case of any person arrested for violation of the preceding articles relating to speed of vehicles, unless such persons so

> arrested shall demand that he be taken forthwith before a court of competent jurisdiction for an immediate hearing, the arresting officer shall take the license number, name, and make of the car, the name and address of the operator or driver thereof, and notify such operator or driver in writing to appear before a designated court of competent jurisdiction at a time and place to be specified in such written notice at least ten days subsequent to the date thereof, and upon the promise in writing of such person to appear at such time and place, such officer shall forthwith release such person or persons from custody. Any person willfully violating such promise, regardless of the disposition of the charge upon which he was originally arrested, shall be fined not less than five nor more than two hundred dollars.

Under Article 803 of the Penal Code, an officer is empowered to stop motor vehicles for violation of traffic laws and safety regulations, and he also has authority to search such vehicles incidental to the arrest.

The Uniform Highway Act

The Uniform Act Regulating Traffic on Highways was enacted in 1947 by the 50th Texas Legislature and was designed to retain and extend the regulation of automobiles as originally set down in the Penal Code:

Article 670ld, Sec. 153, R.C.S.

> Any peace officer is authorized to arrest without warrant any person found committing a violation of any provision of this Act.

The Texas courts have long upheld the right and duty of peace officers to make arrests without warrant for traffic violations. They have also allowed the search of vehicles for evidence of other crimes incidental to a traffic arrest. The Texas Court of Criminal Appeals has stated:

> Once a bona fide stop or arrest has been made for a traffic offense, the police can make an additional arrest for any other offense unexpectedly discovered during the course of the investigation. If, while questioning a motorist regarding the operation of his vehicle, an officer sees evidence of a criminal violation in open view, or in some other manner acquires probable cause on a more

serious charge he may arrest for that offense and incident thereto conduct an additional search for physical evidence.[28]

Pertinent court decisions

Piland v. State, 162 Tex. Cr. R. 363; 285 S.W. 2d 230 (1955).

The defendant was stopped for driving a vehicle with only one license plate, and radio check by the officer revealed the plate to be fictitious. Subsequent search of the car revealed the fruits of a burglary. A robbery conviction was sustained based on the evidence found in the vehicle.

Doran v. State, 163 Tex. Cr. R. 212; 290 S.W. 2d 510 (1956).

Officers stopped the defendant for running a flashing red light. As they checked his operator's license, they observed his attempt to conceal something. Search of the car revealed marijuana, and conviction for possession of marijuana was sustained.

Richardson v. State, 163 Tex. Cr. R. 585; 294 S.W. 2d 844 (1956).

The defendant was arrested for speeding and found to be in possession of paraphernalia for using narcotic drugs. The Court of Criminal Appeals stated, "If the officer observed the appellant violating a traffic law, he was authorized in arresting him and searching his person. If after the arrest he observed that the appellant was intoxicated, or under the influence of a narcotic drug, he was then authorized to search the vehicle."

Aaron v. State, 163 Tex. Cr. R. 635; 296 S.W. 2d 264 (1956).

When arrested for DWI, the defendant was found to have heroin in his shirt pocket. Conviction for possession of heroin was sustained.

Staton v. State, 354 S.W. 2d 582 (1962).

The defendant was arrested for speeding, and a pistol was found in the front seat of the car. Conviction for carrying a prohibited weapon was upheld.

Anderson v. State, 391 S.W. 2d 54 (1965).

The defendant was observed driving without lights at 3:45 a.m. Upon stopping the car, officers found evidence of a burglary and burglary tools, and two suspects were found attempting to hide in the back seat. A robbery conviction was sustained based on the evidence found.

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[28] Taylor v. State, 421 S.W. 2d 403 (1968).

Preventing Offenses

Chapter 5 of the Texas Code of Criminal Procedure provides that a private citizen may lawfully resist any offense against his person or any attempt to injure him or to take his property. Peace officers may prevent unlawful acts about to be committed in their presence.

Article 5.01 (65), C.C.P. - May prevent

The commission of offenses may be prevented either by lawful resistance or by the intervention of the officers of the law.

Article 5.02 (66), C.C.P. - Resistance to protect person

Resistance by the party about to be injured may be used to prevent the commission of any offense which, in the Penal Code, is classed as an offense against the person.

Article 5.03 (67), C.C.P. - To protect property

Resistance may also be made by the person about to be injured, to prevent any illegal attempt by force to take or injure property in his lawful possession.

Article 5.04 (68), C.C.P. - Limit to resistance

The resistance which the person about to be injured may take to prevent the commission of the offense must be proportioned to the injury about to be inflicted. It must be only such as is necessary to repel the aggression.

Article 5.05 (69), C.C.P. - Excessive force

If the person about to be injured, in respect either to his person or property, uses a greater amount of force to resist such injury than is necessary to repel the aggressor and protect his own person or property, he is himself guilty of an illegal act, according to the nature and degree of the force which he has used.

Article 5.06 (70), C.C.P. - Other person may prevent

Any person other than the party about to be injured by another may also, by the use of necessary means, prevent the commission of the offense.

Article 5.07 (71), C.C.P. - Defense of another

The same rules which regulate the conduct of the person about to be

injured, in repelling the aggression, are also applicable to the conduct of him who interferes in behalf of such person. He may use a degree of force proportioned to the injury about to be inflicted, and no greater.

Chapter 6 of the Code of Criminal Procedure provides that peace officers have a duty to prevent the commission of offenses in their presence:

Article 6.05 (76), C.C.P. - Duty of peace officer as to threats

It is the duty of every peace officer, when he may have been informed in any manner that a threat has been made by one person to do some injury to himself or to the person or property of another, to prevent the threatened injury, if within his power; and, in order to do this, he may call in aid any number of citizens in his county. He may take such measures as the person about to be injured might for the prevention of the offense.

Article 6.06 (77), C.C P. - Peace officer to prevent injury

Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another or injure himself, it is his duty to prevent it; and, for this purpose, the peace officer may summon any number of the citizens of his county to his aid. The peace officer must use the amount of force necessary to prevent the commission of the offense and no greater.

Article 6.07 (78), C.C.P. - Conduct of peace officer

The conduct of peace officers, in preventing offenses about to be committed in their presence, or within their view, is to be regulated by the same rules as are prescribed in the action of the person about to be injured. They may use all force necessary to repel the aggression.

City Ordinances Authorizing Arrest

It is a universal rule of law that incorporated towns and cities may pass ordinances as authorized by their state statutes. Most cities authorize law enforcement officers to make arrests for violation of these ordinances. A typical example is found in the Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas:

> It shall be the duty of every policeman to make arrests, without a warrant, when a state law or city ordinance has been violated in his presence. But in making such arrest and in conveying the offender to the city jail, he shall use only such force as is necessary to effect his purpose.[29]

Only a city police officer is authorized to arrest for a violation of a city ordinance unless such a violation constitutes a breach of the peace or is also a violation of some state statute. Probably the most commonly enforced city ordinances are the ones regulating traffic. The Uniform Act Regulating Traffic on Highways specifically empowers governing bodies of cities or towns to enact ordinances regulating traffic within their jurisdictions as a proper exercise of their police powers, as long as such ordinances are not inconsistent with the state Act.[30] It is essential that officers of towns and cities be completely familiar with the ordinances of their jurisdictions, since many of these laws have no counterparts under the state statutes.

Ancillary Arrest Authority

In addition to the statutes which focus on enforcement arrests, certain other arrest statutes must be considered by the peace officer. Included are the statutes covering arrest for violation of federal laws, detention for identification, detention of the mentally ill, arrest of probation and parole violators, and summons by magistrates or judges.

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[29] Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, 1960: Chapter 37, Section 6, p. 883.

[30] Article 6701-D, Section 27, R.C.S.

Arrest for violation of federal laws

It has been stated as a general rule that state and local law enforcement officers have authority to arrest for violations of federal law committed within their presence or view.[31] One federal court has held that officers have not only the right but the duty to make such arrests.[32] This authority is said to be granted on the basis that the laws of the United States are the "supreme law of the land" and as such are as binding as state and local laws.[33]

While federal statutes permit state judges and magistrates to hold preliminary hearings,[34] state and local officers should deliver persons arrested for violation of federal laws to the appropriate federal law enforcement official so that the person may be arraigned before a United States Commissioner or one of the newly created Federal Magistrates for proper charges.[35] In cases where both federal and state or local charges are pending against an accused, prompt and complete cooperation between law enforcement officials is necessary.

Detention for identification

Officers may now demand that persons believed to be witnesses to a criminal offense identify themselves. The Code of Criminal Procedure provides:

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[31]Alexander, op. cit., p. 254.

[32]Marsh v. United States, 29 F 2d 172; cert. den. 279 U.S. 849; 49 S. Ct. 346 (1929).

[33]Fisher, op. cit., p. 255. [34]18 U.S.C.A., Sec. 3041.

[35]Federal Rule of Criminal Procedure 5 (1968).

Article 2.24, C.C.P. - Identification of witnesses

> Whenever a peace officer has reasonable grounds to believe that a crime has been committed, he may stop any person whom he reasonably believes was present and may demand of him his name and address. If such person fails or refuses to identify himself to the satisfaction of the officer, he may take the person forthwith before a magistrate. If the person fails to identify himself to the satisfaction of the magistrate, the latter may require him to furnish bond or may commit him to jail until he so identifies himself.

The witness cannot be forced to make a statement--only to furnish proper identification. Further, in a recent case, the Texas Court of Criminal Appeals held that should an officer, while detaining a witness for identification, discover probable cause for the arrest of the witness, he may arrest such a person without a warrant.[36]

This statute also permits an officer to compel an accused offender to identify himself.[37] Clearly, the officer cannot lawfully compel the accused to make a statement, but he may properly warn him of his constitutional rights against self-incrimination, as prescribed by Texas law, and may question either the witness or the suspect.[38]

Detention of the mentally ill

It is well settled in most states that persons who are mentally ill may be detained for their own protection to prevent them from injuring themselves or others.[39] This detention is also part of the process to determine the person's mental capacity. The "Texas Mental Health Code" provides:

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[36] Byrd v. State, 447 S.W. 2d 937 (1969).

[37] Trammel v. State, 445 S.W. 2d 924 (1969).

[38] Article 38.22, C.C.P. [39] Fisher, op. cit., p. 65.

Article 5547-27, R.C.S. - Authority of health or peace officer

> Any health officer or peace officer who has reason to believe and does believe, upon the representation of a credible person, in writing, or upon the basis of the conduct of the person or the circumstances under which he is found, that the person is mentally ill and because of his mental illness is likely to cause injury to himself or others if not immediately restrained, may, on obtaining a warrant from any magistrate, take such person into custody, and immediately transport him to the nearest hospital and make an application for his admission, pursuant to the warrant of the magistrate. Such person admitted upon such warrant may be detained in custody for a period not to exceed twenty-four (24) hours, unless a further written order is obtained from the County Court or Probate Court of such county ordering further detention. Provided, however, that should the person be taken into custody on a Saturday, or Sunday, or a legal holiday, then the twenty-four hour period allowed for obtaining the court order permitting further detention shall begin at 9 o'clock a.m. on the first succeeding business day.

The purpose of this statute is not to confine the person to jail but to provide for examination of his physical and mental condition so that his status may be properly evaluated or adjudicated.

Arrest of probation and parole violators

The Code of Criminal Procedure expressly authorizes arrest of those who violate the terms of probation or parole. It provides that the judge of the court where the accused was granted probation may issue a warrant of arrest when the accused has violated the terms imposed by the court.[40] The Board of Pardons and Paroles may issue a warrant of arrest, on order from the governor, for any convict who has violated the terms of his parole from the Texas Department of Corrections.[41] This warrant may also be issued to prison officials and to state and local law enforcement personnel. In either case, the prisoner is

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[40]Article 42.12, Section 8, C.C.P.

[41]Article 42.12, Section 21, C.C.P.

entitled to a hearing on the revocation following his arrest.

Summons by magistrate or judge

The Code of Criminal Procedure permits the magistrate[42] or the judge empowered to issue a capias for the arrest of the accused[43] to issue a summons in lieu of a warrant of arrest when immediate arrest is necessary due to the facts indicated in the crime charged. The summons is a formal notice to appear in court to answer a criminal charge filed therein; it is not an order to arrest. It is discretionary with the issuing authority under the statutes and may be served on the accused by delivery of a copy to him personally, delivery of a copy to his dwelling or usual place of abode, or by mailing a copy to his last known address. If the accused fails to appear at the time, date and place named in the summons, the magistrate is then authorized by law to issue a warrant or capias for his arrest. Federal Rule of Criminal Procedure 5 provides the United States Commissioner or Federal Magistrate with similar power.

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[42]Article 15.03, C.C.P.

[43]Article 23.03, C.C.P.

CHAPTER VII

USE OF FORCE IN MAKING AN ARREST

Since the law enforcement officer has a duty to make arrests, the law empowers him to use such force as is reasonable and necessary to take an offender into custody. Such use of force is justified only in the making of a lawful arrest. The precise limits of force are not defined by statute, but the officer may use no more force than is reasonable and necessary to effect the arrest.

Article 15.24 (241), C.C.P. - What force may be used

> In making an arrest, all reasonable means are permitted to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused.

Article 37, P.C. - Officer justified

> A person in the lawful execution of a written process or verbal order from a court or magistrate is justified for any act done in obedience thereto. A peace officer is in like manner justified for any act which he is bound by law to perform without warrant or verbal order.

Article 1210, P.C. - By officer in the execution of lawful order

> Homicide by an officer in the execution of lawful orders of magistrates and courts is justifiable when he is violently resisted and has just grounds to fear danger to his own life in executing the order.

Article 14.05 (216), C.C.P. - Rights of officer

> In each case enumerated where arrests may be lawfully made without warrant, the officer or other making the arrest is justified in adopting all measures which he might adopt in cases of arrest under warrant.

When an officer possesses a warrant of arrest for a felony charge, the Code of Criminal Procedure allows him to forcibly enter a private

residence. This authority is not granted, however, in cases of misdemeanor arrests.

Article 15.25 (242), C.C.P. - May break door

In case of felony, the officer may break down the door of any house for the purpose of making an arrest, if he be refused admittance after giving notice of his authority and purpose.

In addition to the above statutes, Article 1222 of the Penal Code, which applies to both peace officers and private citizens, sets out certain conditions under which homicide is justifiable.

Article 1222, P.C. - In preventing felonies, etc.

Homicide is justifiable when inflicted for the purpose of preventing murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night, or when inflicted upon a person or persons who are found armed with deadly weapons and in disguise in the night time on premises not his or their own, whether the homicide be committed by the party about to be injured or by another in his behalf when the killing takes place under the following circumstances:

(1) It must reasonably appear by the acts or by words coupled with the acts of the person killed that it was the purpose and intent of such person to commit one of the offenses above named.

(2) The killing must take place while the person killed was in the act of committing the offense,or after some act done by him showing evidently an intent to commit such an offense.

(3) It must take place before the offense committed by the party killed is actually completed, except that in case of rape the ravisher must be killed at any time before he has escaped from the presence of his victim, and except also in the cases hereinafter enumerated.

(4) Where the killing takes place to prevent the murder of some other person, it shall not be deemed that the murder is completed so long as the offender is still inflicting violence, though the mortal wound may have been given.

(5) If homicide takes place in preventing a robbery, it is justifiable if done while the robber is in the presence of the one robbed or is flying with the property taken by him.

(6) In cases of maiming, disfiguring or castration, the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense.

(7) In case of arson, the homicide may be inflicted while the offender is in or at the building or other property burnt, or flying from the place before destruction of same.

(8) In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

(9) When the party slain in disguise is engaged in any attempt by word, gesture or otherwise to alarm some other person or persons and put them in bodily fear.

The amount of force which may be deemed "reasonable and necessary" varies with the facts of each arrest, but an arresting officer clearly may not use wanton or unnecessary violence. The Texas Court of Criminal Appeals has stated, "A commission to be a peace officer is not a license to commit an assault."[1]

An offender is legally bound to submit to a lawful arrest, and any resistance on his part will justify the officer in filing additional charges of resisting arrest and assault, if such results from the offender's actions. The accused, on the other hand, has no duty to submit to an unlawful arrest or to unnecessary violence on the part of the officer, and he may lawfully resist such acts. Use of excessive force or execution of an unlawful arrest may result in the filing of civil and/or criminal charges against the arresting officer.

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[1] Vera v. State, 111 Tex. Cr. R. 85; 10 S.W. 2d 383 (1928).

CHAPTER VIII

IMMUNITY FROM ARREST

There are limitations regarding the arrest of certain individuals. These limitations exist because of recognized immunities accorded to the status of these persons.

Diplomatic Immunity

Diplomatic immunity from arrest has been recognized as a principle of international law throughout history. Such immunity is granted to government officials of the national sovereignty which they represent. This does not apply to all aliens--only to those holding true diplomatic status.[1] Diplomatic immunity protects foreign ambassadors, ministers, emissaries and legations, together with their employees, staffs, servants and members of their immediate families, from arrest and prosecution in countries where they are sent by their national governments. This protection is afforded because these individuals are considered to be direct representatives of their national sovereignty. This does not accord them the privilege of breaking our laws but merely exempts them from arrest and criminal prosecution. Any such individual who does violate our laws is normally asked to leave the country through diplomatic action of our Department of State.

The buildings or houses used as offices or homes of diplomatically immune persons are likewise exempt from the normal law of search and

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[1]Article 29, P.C.

seizure, this property being considered as foreign soil from the diplomatic viewpoint. This rule of diplomatic immunity also protects the diplomatic corps of the United States while serving in foreign countries.

Foreign consuls and their employees are not normally granted full diplomatic immunity, as they are usually commercial agents who handle business matters for their country or its citizens. In some cases, however, consuls are granted immunity by the Department of State. Persons granted diplomatic immunity are normally registered with this department and carry upon their persons cards identifying them and stating their immunity from arrest.

Members of the United States Congress and the Texas Legislature

Article 1, Section 6 - Public laws of the United States (excerpt)

Senators and Representatives shall be privileged from arrest during their attendance at the sessions of their respective Houses, and in going to and returning from the same.

Article 1.21 (18), C.C.P. - Privilege of legislators

Senators and Representatives shall, except in cases of treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same, allowing one day for every twenty miles such member may reside from the place at which the Legislature is convened.

Voters on Election Days

Article 1.22 (19), C.C.P., and Constitution, Article 6, Section 5

Voters shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom.

Article 261, P.C.

If any magistrate or peace officer shall knowingly cause an elector

to be arrested in attending upon, going to, or returning from an election, except in cases of treason, felony or breach of the peace, he shall be fined not exceeding three hundred dollars.

State Militia

Article 5847, R.C.S.

No person belonging to the active militia of this State shall be arrested on any civil process while going on duty or returning from any place at which he may be required to attend from military duty, except in cases of treason, felony, or breach of the peace.

Article 5891, Section 12 (c), R.C.S.

No officer or enlisted man of the Texas State Guard shall be arrested on any warrant, except for treason or felony, while going to, remaining at, or returning from the place where he is ordered to attend for military duty. Every officer and enlisted man of such forces shall, during his service therein, be exempt from service upon any posse comitatus and from jury duty.

Out-of-State Witnesses

Article 24.28, Section 5 (486A), C.C.P. - Uniform act to secure attendance of witnesses from without State

If a person comes into this State in obedience to a summons directing him to attend and testify in this State, he shall not while in this State pursuant to such summons be subject to arrest.

CHAPTER IX

DISPOSITION PROCEDURES FOLLOWING ARREST

Search Incidental to Arrest

The right of a law enforcement officer to search an arrested person is well founded in all jurisdictions of the United States. The Supreme Court has stated:

> Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime . . . The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as the need to prevent the destruction of evidence of a crime--things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control . . . .[1]

Search is limited, however, to the person of the accused and the area under his immediate control or in his immediate vicinity. A general exploratory search or search of places or locations remote or away from the place of lawful arrest may not be conducted without the consent of the accused or possession of a search warrant.[2] The area "under the immediate control" of the accused refers to his person or the area within his reach or in plain view. The exact area depends upon the facts and

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[1] Preston v. United States, 376 U.S. 364; 84 S. Ct. 881 (1964); and Chimel v. California, 395 U.S. 752; 89 S. Ct. 2034 (1969).

[2] Chimel v. California, supra.; and James v. Louisiana, 382 U.S. 37; 86 S. Ct. 151 (1965).

circumstances in each case.[3]

Evidence found as a result of a search incidental to lawful arrest is admissible in court.[4] However, should the arrest be held unlawful, the evidence so seized is inadmissible.[5] While no precise data are available, it is well recognized by law enforcement authorities that the majority of evidence gained through search and seizure is the result of an arrest, rather than search with a warrant.[6]

Magistrate's Proceedings

In every case where an arrest is made, either with or without a warrant, the arresting officer has a duty to take the accused before a magistrate. If the arrest is made with a warrant, the Code of Criminal Procedure provides:

> Article 15.17, C.C.P. - Duties of arresting officer and magistrate
>
> In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him.

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[3]Taylor v. State, 421 S.W. 2d 402 (1967). [4]Terry v. Ohio, supra.

[5]Mapp v. Ohio, supra., and Article 38.23, C.C.P.

[6]Criminal Law and the Constitution (Ann Arbor, Michigan: Institute of Continuing Education, 1968), p. 138.

> The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law.

In cases where the arrest is made without a warrant, a similar duty is imposed upon the arresting officer:

> Article 14.06, C.C.P. - Must take offender before magistrate
>
> In each case enumerated in this Code, the person making the arrest shall take the person arrested or have him taken without unnecessary delay before the magistrate who may have ordered the arrest or before some magistrate of the county where the arrest was made without an order. The magistrate shall immediately perform the duties described in Article 15.17 of the Code.

Arrest for Traffic Violations

Persons arrested for violation of traffic laws must be taken before a magistrate if they demand a hearing. Otherwise, they may be released by the arresting officer with a citation to appear.[7] Failure to take an arrested person before a magistrate without unnecessary delay may be the basis for legal damage action in civil court against the arresting officer.[8] While the courts recognize that a magistrate is not always readily available, it is the officer's duty to obtain one, and he must certainly do so not later than the beginning of the next business day of the court.[9]

Confessions

The United States Supreme Court has also held that failure of the arresting officer to promptly arraign an accused may be grounds for

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[7]Article 792, P.C.; and Article 6701d, Section 147, R.C.S.

[8]Heath v. Boyd, supra.; and Hicks v. Matthews, 266 S.W. 2d 846 (1954).

[9]Opinion C-558, Texas Attorney General (December 6, 1965).

exclusion of evidence obtained during the arrest or a confession made following the arrest.[10] While these cases were decided under Federal Rule 5a, the Texas statute requiring an officer to take the accused before a magistrate is worded similarly. Both use the term "without unnecessary delay".[11] The Texas Court of Criminal Appeals has indicated by dictum that they might follow the spirit of these cases based on our statutory requirement. The Texas rule is that "illegal detention", not unlawful arrest, may under certain circumstances invalidate a confession.[12]

In 1968, the Congress of the United States passed Public Law 90-351, amending Section 3501 of Title 18 of the United States Code Annotated, as follows:

Section 3501 - Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession,

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[10] McNabb v. United States, 318 U.S. 332; 63 S. Ct. 708 (1943); and Mallory v. United States, 354 U.S. 449; 75 S. Ct. 1356 (1957).

[11] Articles 14.06 and 15.17, C.C.P.

[12] Davis v. State, 430 S.W. 2d 210 (1968).

(3) whether or not such defendant was advised or knew that he was not required to make any statement and that such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

No cases have been decided under this ruling at the time of this writing. However, the intent of Congress seems to be to relax the strict interpretations of the McNabb and Mallory cases.

The Texas confession rules are set out in Article 38.22 of the Code of Criminal Procedure, which provides:

Article 38.22, C.C.P. - When oral and written confessions shall be used (partial content)

The oral or written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible if:

(a) it be shown to be the voluntary statement of the accused taken in the presence of an examining court in accordance with law; or

(b) it be de in writing and signed by the accused, and show that the accused has at some time prior to the making thereof received from the person to whom the statement is made the warning set out in Subsection (c) (1), (2) and (3) below or received from the magistrate the warning provided in Article 15.17, and shows the time, date, and place of the warning and the name of the person or magistrate who administered the warning; or

(c) it be made in writing to some person who has warned the defendant from whom the statement is taken that (1) he has the right to have a lawyer present to advise him either prior to any questioning or during any questioning, (2) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to counsel with him prior to or during the questioning, and (3) he has the right to remain silent and not to make any statement at all and that any statement he makes may be used in evidence against him at his trial.

The Texas Court of Criminal Appeals has recently held that the above confession warning may be given to the accused either by the

arresting officer or the magistrate.[13] However, this ruling does not relieve the officer of his statutory duty to take the accused before a magistrate.

Out-of-County Warrant

When a law enforcement officer makes an arrest with a warrant issued in a county other than his own, the Code of Criminal Procedure imposes the following statutory duties upon him:

Article 15.16 (233), C.C.P. - How warrant is executed

> The officer or person executing a warrant of arrest shall immediately take the person before the magistrate who issued the warrant or before the magistrate named in the warrant, if the magistrate is in the same county where the person is arrested. If the issuing or named magistrate is in another county, the person arrested shall be taken without unnecessary delay before some magistrate in the county in which he was arrested.

Article 15.18 (235), C.C.P. - Arrest for out-of-county offenses

> One arrested under a warrant issued in a county other than the one in which the person is arrested shall be taken before a magistrate of the county where the arrest takes place who shall take bail, if allowed by law, and immediately transmit the bond taken to the court having jurisdiction of the offense.

Article 15.19 (236), C.C.P. - Notice of arrest

> If the accused fails or refuses to give bail, as provided in the preceding Article, he shall be commited to the jail of the county where he was arrested; and the magistrate committing him shall immediately notify the sheriff of the county in which the offense is alleged to have been committed of the arrest and commitment, which notice may be given by telegraph, by mail, or by other written notice.

Article 15.20 (237), C.C.P. - Duty of sheriff receiving notice

> The sheriff receiving the notice shall forthwith go or send for the

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[13] Easley v. State, 448 S.W. 2d 490 (1969).

prisoner and have him brought before the proper court or magistrate.

Article 15.21 (238), C.C.P. - Prisoner discharged if not timely demanded

If the proper officer of the county where the offense is alleged to have been committed does not demand the prisoner and take charge of him within ten days from the day he is committed, such prisoner shall be discharged from custody.

Habeas Corpus Proceedings

Article 11.01 (113) - What writ is

The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint.

From the peace officer's viewpoint, the purpose of a habeas corpus proceeding before a trial is to determine whether a person in jail or confinement is being lawfully held. The judge ordering the hearing on the application for writ may order the person released on bond pending the hearing, or he may order the person having custody of the accused to appear in court, bringing the accused before the court at that time. The filing of a proper charge in the manner prescribed by law normally satisfies the requirement of lawful custody following arrest, but, when no charge is filed, the officer having custody of the accused is bound to discharge or release him from further confinement. The officer receiving the writ is bound by law to obey its order.

Article 11.34 (146), C.C.P. - Disobeying writ

When service has been made upon a person charged with the illegal custody of another, if he refuses to obey the writ and make the return required by law, or, if he refuses to receive the writ, or conceals himself, the court or judge issuing the writ shall issue a warrant directed to any officer or other suitable person willing to execute the same, commanding him to arrest the person charged with

the illegal custody or detention of another and bring him before such court or judge. When such person has been arrested, and brought before the court or judge, if he still refuses to return the writ, or does not produce the person in his custody, he shall be committed to jail and remain there until he is willing to obey the writ of habeas corpus, and until he pays all costs of the proceeding.

CHAPTER X

PROBLEMS RELATING TO UNLAWFUL ARREST

The fact that an accused has been unlawfully arrested is not in itself grounds for quashing an indictment or a complaint,[1] and does not serve as a bar to trial on the merits of the charges brought against him.[2] The unlawful arrest does, however, normally render evidence seized at the time of the arrest inadmissible against the accused, and it may be the basis for civil and/or criminal charges against the person making the arrest.

The Exclusionary Rule

The Exclusionary Rule of Evidence is a judicially created rule of law which excludes from evidence any matter seized as a result of an unlawful arrest, search or seizure. This rule was first firmly established in 1914 by the United States Supreme Court in the case of Weeks v. United States,[3] in which the Court held that the Fourth Amendment to the Constitution barred the use of evidence secured through illegal search or seizure. This decision applied only in federal prosecutions, and there was no bar to the use of unlawfully seized evidence in state

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[1] Johnson v. State, 379 S.W. 2d 329 (1964).

[2] Davis v. State, supra.

[3] Weeks v. United States, 232 U.S. 383; 34 S. Ct. 341 (1914).

courts until the case of Mapp v. Ohio in 1961.[4]

Two years later the Supreme Court ruled that the Mapp decision did not require the states to adopt federal rules and standards of admissibility, leaving the states free to adopt their own standards.[5] These standards must, however, meet the ones set by the Constitution of the United States.

The State of Texas adopted the Exclusionary Rule by statutory enactment in 1925, when Article 727a of the then Code of Criminal Procedure was passed, excluding from evidence any unlawfully seized matter. The 1925 Texas statute, with minor changes, now appears in Article 38.23 of the 1965 Code of Criminal Procedure.

Article 38.23 (727a), C.C.P. - Evidence not to be used

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

In a recent review of the Exclusionary Rule, the United States Supreme Court made the following comments:

> Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct . . . Thus its major thrust is a deterrent one . . . and experience has taught that it is the only effective deterrent to police misconduct in the criminal contest, and that without it the constitutional guarantees against

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[4] Mapp v. Ohio, supra.

[5] Ker v. California, supra.

unreasonable searches and seizures would be a mere "form of words" . . . The rule also serves another vital function--"the imperative of judicial integrity" . . . Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus, in our system, evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents . . . The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot be properly invoked to exclude the products of legitimate police investigative techniques on the ground that such conduct which is closely similar involves unwarranted intrusions upon constitutional protections.[6]

Civil and Criminal Liability for Unlawful Arrest in State Cases

A significant result of unlawful arrest is possible suit against the arresting officer for false arrest or false imprisonment, both well-recognized causes of civil action in Texas.[7] The officer's liability will be based upon the facts and circumstances of the case, the degree of force used to effect the arrest, and the injury done to the arrested person.[8] Punishment for conviction in such a case is a fine not to exceed five hundred dollars or confinement in jail for a period not exceeding one year.[9]

Article 1169 (1039), P.C. - False imprisonment

False imprisonment is the willful detention of another against his consent and where it is not expressly authorized by law, whether such detention be effected by an assault, by actual violence to the person, by threats or by any other means which restrains the party so detained from removing from one place to another as he may see proper.

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[6] Terry v. Ohio, supra.

[7] Heath v. Boyd, supra.

[8] Hicks v. Matthews, supra.

[9] Article 1174, P.C.

If the arresting officer's acts are found to have been wanton, excessive or wholly unreasonable, he may also be subjected to criminal prosecution. If unnecessary or unreasonable force has been used, the officer will be charged with a crime commensurate with the degree of force exercised. Possible charges include murder, negligent homicide or any degree of assault established by the Penal Code. It must be noted that an honest mistake by an officer in arresting the wrong person may be shown in mitigation of damages or as a defense to the charge of false arrest or false imprisonment.[10]

Civil and Criminal Liability for Unlawful Arrest in Federal Cases

The United States Code provides both criminal and civil sanctions against those who make unlawful or otherwise unreasonable arrests through excessive use of force. Title 42, Section 1983, of the United States Code permits civil action to be filed and heard in federal courts, and Title 18, Sections 241 and 242, makes such violations a federal crime subject to prosecution in the federal courts.

Use of Force to Resist Unlawful Arrest

While it is the duty of every person to submit to a lawful arrest, made either with or without a warrant, submission to an unlawful arrest is not required.[11] The limits to resistance to unlawful arrest have never been precisely set down by the courts. The early view was that a

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[10] Schnaufer v. Price, 124 S.W. 2d 940 (1939).

[11] Texas Jurisprudence, op. cit., Section 29, p. 175.

person being so arrested could use any force necessary to resist, even to taking the life of the arresting officer. This view was buttressed on the common knowledge that jails in early times, particularly those in Great Britain, were fearsome places where death frequently resulted from improper treatment, and bail was seldom granted.[12] This attitude has changed considerably in the United States, where bail and writs of habeas corpus are available in most cases, and confinement facilities are much improved.

The Texas standard with regard to unlawful arrest seems to be that the person so arrested has two alternatives--he may choose to appeal to the law for redress by making application for habeas corpus or by institution of a civil suit against the arresting officer, or he may resort to the right of physical resistance.[13] However, should he choose the latter, he may use only such force as is reasonably necessary to prevent the arrest or to free himself from illegal restraint.[14]

The degree of resistance will vary with the circumstances in each case. In some instances, the resistance may take the form of threatening the officer with a deadly weapon, running from him, snatching the warrant from his hand, simply refusing to accompany him, struggling or fighting with him, or actually using the weapon against him. However, the person behaving in such a manner does so at his own risk, since, if the arrest does prove to be lawful, the accused may be charged with resisting arrest or assault on the officer.

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[12]Fisher, op. cit., p. 365.

[13]Ex Parte Baker, 43 Tex. Cr. R. 281; 65 S.W. 91 (1901).

[14]Snow v. State, 91 Tex. Cr. R. 1; 237 S.W. 563 (1922).

The Texas courts have handed down several verdicts of justifiable homicide in cases where an officer was slain while attempting to make an unlawful arrest.[15] It is therefore absolutely essential that all officers fully understand the elements of a lawful arrest and that they exercise careful judgment and professional demeanor when making or attempting to make an arrest.

Judge Henry Friendly has stated:

> The law relating to arrest and detention does not always provide bright lines, and minor errors by the police are hardly to be avoided. But, when the police operate in calculated and substantial disregard of the applicable rules, they cannot expect the benefit of any doubt as to undue pressure in a truly close case.[16]

Although it has been suggested that many of the difficult situations in which law enforcement officers become involved are due to archaic arrest laws, all too often the fault really lies in the fact that the officer does not clearly understand what the law requires of him.[17]

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[15] Ely v. State, supra.; Tiner v. State, 44 Tex. 128 (1875).

[16] Collins v. Beto, 348 F 2d 823, 5th Cir. (1965).

[17] Comments: The Law of Arrest in Texas (27 Baylor L. Rev. 303, 1965).

CHAPTER XI

EXISTING "MODEL" LEGISLATION

A student of the law of arrest would be unable to complete his study of the subject without review of the existing "model" statutes, three of which have had or are having considerable influence on legislative bodies, legal authorities and the judiciary. These "models" are the Uniform Arrest Act, the Model State Statute on "Stop and Frisk", and the American Law Institute's Model Pre-Arraignment Procedure. While none of these statutes is in effect in Texas, they do provide realistic guidelines for future legislation and for improvement in the present Texas laws of arrest.

The Uniform Arrest Act

This Act was prepared by the Interstate Commission on Crime after several years of study. It is truly a classic effort to update the laws of arrest, the authors having fully recognized that current arrest laws antedate modern police practice and requirements for public safety.[1] The Act was adopted with minor modifications in the states of Delaware, New Hampshire and Rhode Island. Regrettably, however, it was published in its final form in 1942 and consequently assumed the aura of a wartime emergency measure. While the end of World War II brought little effort

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[1]Sam B. Warner, The Uniform Arrest Act, 28 Va. L. Rev. (1942), p. 315.

toward further passage, many states have been influenced by its provisions, the State of Texas having adopted Section 12, "Identification of Witnesses", in 1967.[2] The following is the text of the Act:

THE UNIFORM ARREST ACT

An Act Concerning Arrests by Peace Officers, Providing for the Questioning and Detention of Suspects, Searching Suspects for Weapons, the Force Permissible in Making and Resisting Arrest, Arrests without a Warrant, the Use of Summons Instead of Arrest, the Release and Detention of Persons Arrested and the Identification of Witnesses, Prescribing Penalties, and Making Uniform the Law Relating Thereto.

Section 1. Definitions. As used in this act:

"Arrest" is the taking of a person into custody in order that he may be forthcoming to answer for the commission of a crime.

"Felony" is any crime which is punishable by death or imprisonment for more than one year. Any other crime or any violation of a municipal ordinance is a misdemeanor. (Change, if necessary, to definition appropriate for your state.)

"Peace officer" is any public officer authorized by law to make arrests in a criminal case.

Section 2. Questioning and Detaining Suspects.

(1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed, or is about to commit a crime, and may demand of him his name, address, business abroad, and whither he is going.

(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

(3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

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[2]Article 2.24, C.C.P.

Section 3. Searching for Weapons. Persons Who Have Not Been Arrested.

A peace officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in Section 2, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person. The arrest may be for illegal possession of the weapon.

Section 4. Arrest - Permissible Force.

(1) No unreasonable force or means of restraint shall be used in detaining or arresting any person.

(2) A peace officer who is making an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall he be deemed an aggressor or lose his right to self defense by the use of reasonable force to effect an arrest.

(3) A peace officer, who has reasonable ground to believe that the person to be arrested has committed a felony, is justified in using such force as may be necessary to effect an arrest, to prevent escape or to overcome resistance only when:

(a) There is no other apparently possible means of making the arrest or preventing escape, and

(b) The officer has made every reasonable effort to advise the person that he is a peace officer and is making an arrest.

Section 5. Resisting Arrest.

If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest, regardless of whether or not there is a legal basis for the arrest.

Section 6. Arrest without a Warrant.

(1) An arrest by a peace officer without a warrant for a misdemeanor is lawful whenever:

(a) He has reasonable ground to believe that the person to be arrested has committed a misdemeanor in his presence.

(b) He has reasonable ground to believe that the person to be arrested has committed a misdemeanor out of his presence, either within the state or without the state, if the law enforcement officers of the state where the misdemeanor was committed so request, and will not be apprehended unless immediately arrested.

(2) An arrest by a peace officer without a warrant for a felony, whether committed within or without the state, is lawful whenever:

(a) He has reasonable ground to believe that the person to be arrested has committed a felony, whether or not the felony has in fact been committed.

(b) A felony has been committed by the person to be arrested although before making the arrest the officer had no reasonable ground to believe the person committed it.

Section 7. Arrest on Improper Grounds.

If a lawful cause of arrest exists, the arrest is lawful even though the officer charges the wrong offense or gives a reason that does not justify the arrest.

Section 8. Arrest Under a Warrant Not in Officer's Possession.

An arrest by a peace officer acting under a warrant is lawful even though the officer does not have the warrant in his possession at the time of the arrest, but, if the person arrested so requests, the warrant shall be shown to him as soon as practicable.

Section 9. Summons Instead of Arrest.

(1) In any case in which it is lawful for a peace officer to arrest without a warrant a person for a misdemeanor, he may, but need not, give him a written summons in substantially the following form:

(Insert form appropriate for your state.)

(2) If the person fails to appear in answer to the summons, or if there is reasonable cause to believe that he will not appear, a warrant for his arrest may issue. Willful failure to appear in answer to the summons may be punished by a fine of not over one hundred dollars or imprisonment for not over thirty days.

Section 10. Release of Persons Arrested.

(1) Any officer in charge of a police department or any officer delegated by him may release, instead of taking before a magistrate, any person who has been arrested without a warrant by an officer of his department whenever:

(a) He is satisfied either that there is no ground for making a criminal complaint against the person or that the person was arrested for drunkenness and no further proceedings are desirable.

(b) The person was arrested for a misdemeanor and has signed an agreement to appear in court at a time designated, if the officer is satisfied that the person is a resident of the state and will appear in court at the time designated.

(2) A person released as provided in this section shall have no right to sue on the ground that he was released without being brought before a magistrate.

Section 11. Permissible Delay in Bringing Before Magistrate.

If not otherwise released, every person shall be brought before a magistrate without unreasonable delay, and in any event he shall, if possible, be so brought within twenty-four hours of arrest, Sundays and holidays excluded, unless a judge of the (district) court of the (district) where he is detained or of the (district) court of the (district) where the crime was committed for good cause show orders that he be held for a further period not exceeding forty-eight hours.

Section 12. Identification of Witnesses. (Optional)

Whenever a peace officer has reasonable ground to believe that a crime has been committed, he may stop any person who he has reasonable ground to believe was present thereat and may demand of him his name and address. If the person fails to identify himself to the satisfaction of the officer, he may take the person forthwith before a magistrate. If the person fails to identify himself to the satisfaction of the magistrate, the latter may require him to furnish (an appearance) bond or may commit him to jail until he so identifies himself.

Section 13. Severability.

If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

The Model State Statute on "Stop and Frisk"

This model statute was prepared by the Americans for Effective Law Enforcement, Incorporated, of Chicago, Illinois, as a guide for state legislative bodies, following the decision of the United States Supreme Court upholding the "stop and frisk" statutes of Ohio and New York.[3] The following is the text of the model:

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[3]Terry v. Ohio, supra.

A MODEL STATE STATUTE ON "STOP AND FRISK"[4]

(1) Whenever any peace officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a criminal offense, he may detain such person.

(2) Such detention shall be for the purpose of ascertaining the identity of the person detained and the circumstances surrounding his presence abroad which led the officer to believe that he had committed, was committing, or was about to commit a criminal offense, but no person shall be compelled to answer any inquiry of any peace officer.

(3) No person shall be detained under the provisions of Section 2 of this Act longer than is reasonably necessary to effect the purposes of that subsection, and in no event longer than 15 minutes. Such detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.

(4) If any any time after the onset of the detention authorized by Section 1 of this Act, probable cause for arrest of the person shall appear, the person shall be arrested. If, after an inquiry into the circumstances which prompted the detention, no probable cause for the arrest of the person shall appear, he shall be released.

(5) Whenever any peace officer authorized to detain any person under the provisions of Section 1 of this Act reasonably believes that any person whom he has detained, or is about to detain, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or another, he may search his person to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. If such a search discloses a weapon or any evidence of a criminal offense, it may be seized.

(6) Nothing seized by a peace officer in any such search shall be admissible against any person in any court of this state unless the search which disclosed its existence was authorized by, and conducted in compliance with, the provisions of this Act.

Supreme Court decisions on "stop and frisk" laws

On June 10, 1968, the United States Supreme Court, in a series of three cases, upheld the validity of the principles contained in the

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[4]Furnished through the personal courtesy of Fred E. Inbau, Professor of Criminal Law, Northwestern University School of Law, Chicago, Illinois.

"stop and frisk" statutes, specifically ruling on the statutes of New York and Ohio. While minor differences exist in the various state statutes, the principles announced by the Court merit consideration in this study, since these decisions did, in effect, review the whole law of arrest.

At the present time, the State of Texas has no "stop and frisk" statute. However, the facts and circumstances in the following cases seem analagous to Article 14.03, C.C.P., which authorizes arrest under suspicious circumstances.

Terry v. Ohio, 392 U.S. 1; 88 S. Ct. 1868 (1968).

While patrolling a downtown area in plainclothes, a detective observed the defendant and two companions in front of a store. Their behavior clearly indicated that they were reconnoitering the store. The officer approached, identified himself and asked the three men for their identification. After a brief exchange of words, the officer turned the defendant around and patted down his coat, where he found a pistol. He then arrested all three men, and a pistol was found on one of the other suspects. The defendant was convicted of carrying a concealed weapon.

On appeal, the Ohio Supreme Court upheld the search and seizure of weapons under the state "stop and frisk" statute. The U.S. Supreme Court also upheld the conviction, stating, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." The proper "stop and frisk" was distinguished from a full arrest, and it was pointed out that the officer carefully restricted his search to what was appropriate to the discovery of the items he was looking for. It would clearly be unreasonable to deny an officer the right to neutralize any threat of physical harm, even though he might not be absolutely certain that the suspect is armed. The Court recognized, ". . . the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger . . . ." The officer is entitled to draw reasonable inferences from the facts and from his own experience, and full "probable cause" is not necessary to justify a "stop and frisk".

Sibron v. New York, 392 U.S. 40; 88 S. Ct. 1889 (1968).

The defendant was observed by an officer over a period of several hours, during which he was seen to converse with several known narcotics addicts on the street. He later entered a restaurant, where

he talked with several more known addicts. Entering the restaurant, the officer ordered the defendant outside, where he spoke with him and then searched him, subsequently discovering heroin on his person. The defendant was convicted for possession of narcotics, but the U.S. Supreme Court reversed the decision, declaring the evidence to have been illegally seized and therefore inadmissible, and pointing out that there was no reasonable basis for a search for weapons in this case. An incidental search may not precede an arrest and then serve as its own justification, and an officer is not entitled to seize and search everyone of whom he makes inquiries. He must have constitutionally adequate reasonable grounds for making such a search, and, in the case of a search for weapons made in order to protect himself, he must be able to point to some fact which caused him to reasonably infer that the individual was indeed armed and dangerous.

In this case, the officer's search was not even limited to a patting of the defendant's clothing to discover a weapon. He actually thrust his hand into the defendant's pockets. His testimony showed that he was looking for narcotics, and he found them. Such a search violated the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

Peters v. New York, 392 U.S. 82; 88 S. Ct. 1889 (1968).

Officer Lasky of the New York City Police Department, after stepping out of the shower, heard a noise at the door of his apartment. Upon looking through the peephole in the door, the officer observed two men tiptoeing from his doorway toward the stairs. The officer telephoned police and dressed himself in plainclothes, armed himself, and returned to the peephole, through which he again saw the two men leaving his doorway. Having lived in the building for a number of years and being familiar with its residents, the officer did not recognize either of the men. Believing that he had observed them in the course of an attempted burglary, the officer entered the hallway, slamming his door loudly behind him. The two men took flight down the stairs from the sixth floor with the officer in pursuit. He apprehended the defendant between the fourth and fifth floors and placed him under restraint, then continued with him down another flight in an unsuccessful attempt to catch the other man. Not satisfied with the defendant's later attempt to identify himself, the officer patted him down for weapons and discovered a hard object in his pocket. The officer later stated that the object did not feel like a gun but could have been a knife. The object was revealed to be a plastic envelope containing burglary tools.

The validity of the arrest and the seizure of evidence based on probable cause were upheld due to the circumstances of the case. Officer Lasky had observed the suspicious behavior of the two men, who fled when confronted. The officer's personal experience and his knowledge of the building and its residents justified his suspicion. It is clear that the arrest had for purposes of constitutional justification already taken place before the search commenced. When the

officer grabbed the defendant by the collar, he abruptly "seized" him and curtailed his freedom of movement. The incident search was obviously justified by the need to seize weapons, as well as by the need to prevent destruction of evidence of a crime. The search was a cursory one, designed only to discover weapons.

The Model Pre-Arraignment Procedure

The American Law Institute is presently revising its 1931 Model Code of Criminal Procedure,[5] which will include model legislation relating to arrests, arraignment of prisoners and other problems of criminal justice. Several portions of the proposed Code are expected to provide excellent guidelines for arrests and for administrative practices in the custody and disposition of arrested persons. With the exception of a few sections in study draft, the proposed code is not available for public distribution at this time.[6]

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[5]Comments on the Proceedings of the American Law Institute, 5 Cr. L. Rep. 2186 (May 28, 1969).

[6]Letter from Mrs. Elizabeth Bradbury, Coordinator of Publications, Sales and Distribution, The American Law Institute, Philadelphia, Pa. (Feb. 26, 1969).

actual practice. This can hardly be held the fault of the law enforcement officer, who finds it difficult to fulfill his obligation to uphold the law and at the same time protect the community.[1] The constitutional forum for assessment of legislative change is the Legislature in the capitol, not, the patrolman in the squad car!

Recommendations

The author strongly recommends that the Legislature of the State of Texas take the following action as soon as is practical:

1. Enact the Model State Statute on "Stop and Frisk", as found herein on pages 89 to 92, as Section 'b' of Article 14.03 of the Texas Code of Criminal Procedure. While the Court of Criminal Appeals has recognized the principles of the law of "stop and frisk" in two recent cases,[2] such authority should be given by statutory enactment to comply with the previous admonitions of Texas courts that arrests and detentions without warrant are strictly controlled. The State of Texas should not depart from this position of strict control, but clarification of the "stop and frisk" procedure is badly needed. While some legal authorities have attempted to equate Article 14.03 to the "stop and frisk" rules, it must be remembered that the Texas Court of Criminal Appeals has always required probable cause for arrests under this Article. The present Article should be retained intact as an essential tool for effective law enforcement in situations where full probable cause does exist, but the "reasonable

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[1] Warner, op. cit., p. 315.

[2] Cox v. State, 442 S.W. 2d 696 (1969); and Carter v. State, 445 S.W. 2d 747 (1969).

"grounds" standard of Terry should be given legislative sanction.

2. Amend Article 14.04 of the Texas Code of Criminal Procedure to authorize a law enforcement officer to arrest for misdemeanors involving violence against the person under the same conditions which authorize arrest of a fleeing felon. The Uniform Arrest Act contains such a provision in Section 6, Paragraph 1-b. When the laws of arrest originated in Great Britain, most crimes were felonies. The present academic distinction between a felony and a misdemeanor has no real place in the modern-day effort to prevent street crimes and to suppress violence by the most expeditious means.

3. Enact Section 5 of the Uniform Arrest Act, found on page 90, making it the duty of a person being arrested to submit to the arrest without resistance, regardless of whether or not there is legal basis for the arrest. When the concept of resistance to unlawful arrest was born in early times, bail was usually unattainable, and a judge might not arrive for months to effect a jail delivery. Moreover, conditions in British jails were so deplorable that a prisoner had an excellent chance of dying from disease or maltreatment before trial. With our present judicial system and today's excellent communications, the offender seldom spends a long period of time in jail except in cases of major offense. The person unlawfully arrested has readily available a variety of legal remedies, both civil and criminal, and the only individual truly deriving benefit from continuation of the present concept of resistance to unlawful arrest is the weapon-carrying hoodlum.[3]

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[3]Warner, op. cit., p. 380.

4. Amend Article 14.06 of the Texas Code of Criminal Procedure by adding a Section 'b' similar in substance to Section 9 of the Uniform Arrest Act, as found on page 91, permitting officers to issue a summons to appear in lieu of making an arrest for violation of a statute or ordinance within the jurisdiction of justice of the peace or municipal courts. This procedure would be especially useful in those misdemeanor cases not involving personal violence, danger or threatened property loss. Officers now use this procedure for traffic violations,[4] and magistrates are authorized to use the summons procedure in place of warrants of arrest.[5] While not specifically authorized by law, the Dallas Police Department has for many years been using this procedure in city ordinance cases not involving violence. Examples include violations of ordinances regulating trash disposal, posting of signs, fireworks, and health or fire situations. The use of the summons, at the officer's discretion, can prevent undue hardship upon the violator and may be helpful in establishing public confidence in police enforcement procedures.

Every law enforcement officer must assume the responsibility of learning the laws of arrest and of applying them with careful consideration at all times. He can become a true professional in his field only by continued training and education. The police administrator has an even greater responsiblity to make available the proper training and educational opportunities and to develop policies and procedures which meet the requirements and spirit of the law.

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[4]Article 6701d, Section 148, C.C.P.

[5]Articles 15.03, 23.02 and 23.04, C.C.P.

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