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TRAINING BULLETIN

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Is Viewing Video Acceptable Probable Cause for A Misdemeanor Arrest Committed Outside An Officer's Presence?

Legal Issue

Viewing Video Footage as Probable Cause to Arrest for a Misdemeanor Committed Outside an Officer's Presence.

This article is written in response to a question posed by a Sergeant at the San Diego County Sheriff's Office: "Could you address when it comes to misdemeanor arrests, specifically video surveillance as "in presence."

Many thanks to Bob Phillips, Deputy District Attorney (retired) San Diego County District Attorney's Office, for his contributions to this article. His responses are included along with references to The Fourth Amendment and Search and Seizure: An Update (February 2025).

Discussion

Under 836(a)(1) P.C., "in presence" is commonly interpreted as having personal knowledge that the offense in question has been committed or made known to the officer through any of the officer's five senses (Peo. v. Burgess (1959) 170 Cal.App.2nd 36, 41).

Example

The crime of making annoying or harassing telephone calls to a police dispatcher (653x P.C.) is done in the listener's presence (Peo. v. Bloom (2010) 185 Cal.App.4th 1496).

Video or audio recordings are direct evidence in court (411 E.C.). This evidence directly supports the truth of a claim and doesn't require the jury to draw conclusions based on other facts or circumstances. Given its admissibility in court, video footage then logically leads to forming probable cause to arrest.

The California legislature added retail theft (459.5 P.C.) as one of the exceptions when an officer can make a misdemeanor arrest when the crime occurs outside of his or her presence. An arrest can be made when “the officer views video footage that shows the person to be arrested committing the alleged crime (836(f)(3)(B) P.C.).

The Fourth Amendment standard for making an arrest is probable cause. Probable cause as it relates to arrest means an officer has a reasonable belief, based on sufficient facts and circumstances, that a crime has occurred. Simply put, there is a “fair probability” or “substantial chance” the corpus of the crime has occurred and the person to be arrested is connected to the crime.

Per Bob Phillips: “The requirement that a misdemeanor must have occurred in the officer’s presence to justify a warrantless arrest is not grounded in the Fourth Amendment (*Welsch v. Wisconsin* (1984) 466 U.S. 740). A violation of the “in the presence rule,” arguably the “stale misdemeanor rule,” or any other statutory (as opposed to constitutional) limitation on taking someone into physical custody, does not require the suppression of any evidence to bring about a constitutional violation for civil liability action. These rules are statutory, or non-constitutionally based. Case law states evidence is suppressed only when its discovery is the direct product of a constitutional violation (*Virginia v. Moore* (2008) 553 U.S. 164; *Barry v. Fowler* (1990) 9th Cir. 902 F.2nd 770. Pro Subscribers can read further case authority in [The Fourth Amendment and Search and Seizure: An Update \(February 2025\)](#), Chapter Five, Arrests, pages 733-734 and 803-805.

Examples

A Portsmouth, Virginia officer arrested the defendant for a traffic offense. Virginia law required release on a citation. An arrest search located crack cocaine. Evidence exclusion is not a remedy when an arrest is based upon probable cause. “Incorporating state arrest rules into the Constitution would make Fourth Amendment protections complex and variable from place to place and time to time.” (*Virginia v. Moore* (2008) 553 US 184).

When an officer made an arrest for a DUI misdemeanor where the driving occurred outside of his presence, the resulting blood alcohol evidence was still admissible. “The Fourth Amendment supports arrests for misdemeanors when there is objective and reasonable probable cause to justify the arrest regardless of the “in the presence requirement outlined in the California Penal Code.” (*Peo. v. Burton* (2013) 219 Cal. App. 4th Supp. 9).

A plaintiff was driving her two children home after soccer practice. No one in the vehicle was wearing seat belts. Texas law requires all persons to wear seat belts during vehicle operation. The law also authorized arrest or the issuance of a citation at the officer’s discretion. The officer verbally berated the plaintiff, she was handcuffed, transported to the station, subjected to a property inventory, her mug shot was taken, was fingerprinted and placed in a holding cell for one hour, taken before a magistrate, and released on bond. She pleaded no contest and paid a \$50 fine. She filed a civil suit (“a 1983 Action”) contending a custodial arrest for such a minor crime violated her Fourth Amendment rights. U.S. ruled “if an officer has probable cause to believe that an individual has committed even a very minor offense, he (or she) may, without violating the Fourth Amendment, arrest the offender.” Although the plaintiff suffered “pointless indignity” and “gratuitous humiliations imposed by a police officer who was at best exercising extremely poor judgment,” the arrest was lawful (*Atwater v. City of Lago Vista, Texas* (2001).

Bob Phillips adds a more recent case decision: A Pasadena police officer made an “outside presence” misdemeanor arrest for disturbing the peace (415(2) P.C.). 9USCA ruled “under the Fourth Amendment, it does not matter if Officer Klotz was present when Vanegas committed the misdemeanor.” Rather the crucial inquiry is whether Officer Klotz had probable cause to arrest: “We hold here that he did, thereby there was no constitutional violation.” “No sanctions, including civil liability may be imposed.” (Vanegas v. City of Pasadena (9th Cir. 2022) 46 F.4th 1159).

Bottom Line

“The Fourth Amendment supports arrests for misdemeanors when there is objective and reasonable probable cause to justify the arrest regardless of the ‘in the presence’ requirement outlined in the California Penal Code.” (Peo. v. Burton (2013) 219 Cal. App. 4th Supp. 9). “The in-presence requirement is to be interpreted liberally” and “an arrest can be made when apparent to an officer’s senses” (Peo. v. Welsch (1984) 151 Cal.App.3rd 1038).

Thus, video footage can be a key element in establishing probable cause necessary for arrest.