

# Probable Cause

1

Funded By A Grant From The Texas Court Of Criminal Appeals

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2

## Resources

- ~TJCTC Deskbooks ([www.tjctc.org](http://www.tjctc.org))
  - Magistration, Criminal, and Truancy
- ~Texas statutes ([www.statutes.capitol.texas.gov](http://www.statutes.capitol.texas.gov))
  - Code of Criminal Procedure (CCP)
  - Penal Code
  - Health and Safety Code
  - Transportation Code
  - Alcohol and Beverage Code

3

## Why Is This So Important?

- This is what can happen to a criminal case when there are issues with probable cause:

4

## After Bad Warrants:

- Any search and/or confession that occurred after arrest would be **thrown out**.
  - “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.”  
~CCP Art. 38.23

5

## We Are Dealing With Constitutional Rights!

- Fourth Amendment to the Constitution of the United States
- Article 1, Sec. 9 of the Texas Constitution
- JP’s swear to preserve, protect, and defend those rights!

6

## 4<sup>th</sup> Amendment, U.S. Constitution

“The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches 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.”

7

## Article 1, Sec. 9, Texas Constitution

“The people shall be secure in their persons, houses, papers, and possession from all unreasonable seizures or searches, and no warrant 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.”

8

## What We Will Cover

- Probable Cause Situations
- How to Determine Probable Cause
- Probable Cause Practice

9

## Probable Cause Situations

10

# Judge vs. Magistrate

As a justice of the peace, you serve two distinct roles of judge and magistrate

## Judge

- As a judge, you can only have trials, take pleas, or enter convictions for fine-only misdemeanor cases.

## Magistrate

- You are a magistrate **even if** you do not read defendants their rights at the jail.
- As a magistrate, you have authority to sign arrest warrants for all levels of criminal cases.
- CCP Art. 2.09

11

# It Is Mostly Magistrate Duties

Probable Cause Determined when:

- Arrest Without a Warrant
- Arrest Warrant
- Search Warrant

But:

12

# There Are Some Judge Duties

## Probable Cause Determined when:

- Private Citizen Files a Complaint
- Truancy
  - Falls within judge duties
  - If motion filed, JP must determine if mental illness exists

13

# Warrantless Arrest

- Officers can make an arrest without a warrant if offense was committed within their view.
- Alleged offender must be taken before a magistrate
- First thing magistration must do is determine if probable cause exists

CCP 14.01(b)

14

## Warrantless Arrest Timing

- Magistrate must determine probable cause within:
  - 24 hours for a misdemeanor arrest
  - 48 hours for a felony arrest

CCP 17.033

15

## Warrantless Arrest Procedure

- Peace officer submits probable cause affidavit
- If probable cause is established, a full Article 15.17 hearing must be conducted

16



## Warrantless Arrest Procedure 2

- If no probable cause is established, the accused must be **immediately released without bond**
  - Even a personal bond is not legally allowed if there is no probable cause for the arrest
  - This does not dismiss the case or prevent prosecution if sufficient evidence is provided later

17

## What If You Are Unable To Determine Probable Cause After Warrantless Arrest?

- Misdemeanor Arrest—Must be released 24 hours after arrest on bond not to exceed \$5,000
- Felony Arrest—Must be released 48 hours after arrest on bond not to exceed \$10,000
- If defendant is unable to post a bail bond in the required amount, they **must** be released on a personal bond.

CCP 17.033

18

# Arrest/Search Warrant

- A law enforcement officer must get a warrant if:
  - Arrest warrant: the officer believes someone has committed a crime but did not see the crime occur.
  - Search warrant: the officer believes a person has evidence of a crime and wants to take that evidence.
- ~**Regardless of the offense**, that officer can ask you to issue the warrant.

19

# Arrest/Search Warrant 2

- Before you can issue a warrant, you must be given facts that show that:
    - The person the officer wants to arrest committed the crime the officer wants to arrest him/her for, or
    - The person or place the officer wants to search contains the evidence the officer is looking for.
- ~These facts are what establishes probable cause.

20

# Arrest Warrant Documents

1. **Charging Complaint** – A document charging a person with the commission of an offense.
2. **Probable Cause Affidavit** - A document explaining the facts and circumstances leading the officer to believe a certain person has committed a certain crime and requesting issuance of an arrest warrant.
3. **Arrest Warrant** – An order commanding a peace officer to arrest the person named in the warrant.

21

## Practice Tip For Arrest Warrants!



Often the complaint and probable cause affidavit are combined into one document.



This is fine; **however**, the requirements of both documents must be met, or no warrant may be issued.

22

# Probable Cause Affidavit

- Does more than allege the commission of the offense, it contains **factual statements** which establish probable cause for the arrest of the accused.
- The affidavit must contain facts that establish each and every element of the offense.
  - Find the offense in the Penal Code and make sure the affidavit contains all those elements.

*Carroll v. U.S., 267 U.S. 132*

23

# Probable Cause Affidavit 2

Does not need to track the statutory language defining the offense.

Sworn to and signed by the officer before the magistrate.

- May be in the magistrate's presence.
- May be over the phone.

*Carroll v. U.S., 267 U.S. 132*

24

## Probable Cause Affidavit 3

- A probable cause determination is based **only** on the affidavit.
  - You cannot rely on information told to you by the officer.
  - This is called the “Four Corners” rule.
  - If it is not in the affidavit, treat the information as if it does not exist.

25

## Probable Cause Affidavit 4

- Evidence may be thrown out if the magistrate’s conduct shows that he/she did not act in a **neutral, detached manner**.
- **Do not:**
  - Write or edit the affidavit supporting the warrant.
  - Tell the officer how to “fix” the affidavit supporting the warrant.

26

# Arrest Warrant Procedure

## 1. Swear in the officer:

- Raise your right hand and have the officer raise his/her right hand while facing you.
  - Officer physically there or present via electronic broadcast system.
- Administer the oath.
- Have the officer sign the charging complaint, PC affidavit, and arrest warrant application.

CCP Art. 15.03(c)

27

# Arrest Warrant Procedure 2

## 2. Review the charging complaint, probable cause affidavit, and warrant application:

- Read each document.
- Ensure all requirements are met (all elements of the crime addressed).
- Determine whether there is probable cause.

28

## Arrest Warrant Procedure 3

### 3. If probable cause exists:

- Sign and date the documents.
- State your office next to your signature if it's not included in the body of the warrant.
- If your official seal is not pre-printed on the forms, place your seal near each of your signatures.

29

## Search Warrant Documents

1. **Probable Cause Affidavit** – A document explaining the facts and circumstances leading the officer to believe evidence of a particular crime is located at a particular location and requesting issuance of a search warrant.
2. **Search Warrant** – An order commanding a peace officer to search for and seize a specific item or items.

30

## Probable Cause Affidavit

- Must contain **sufficient facts** that when coupled with inferences from those facts, establish a **fair probability** that evidence of a particular crime will likely be found at the specific location.
- A sworn affidavit is required for every search warrant requested.
- If the warrant is executed:
  - The affidavit is **public knowledge** (unless it's a sealed felony case).
  - Magistrate's clerk must make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

CCP Art. 18.01(b), *Illinois v. Gates*, 462 U.S. 213

31

## Search Warrant Probable Cause Affidavit

The affidavit **must**:

- 1) Describe the person, place, or thing to be searched.
- 2) Name or describe the thing(s) to be seized.
- 3) Describe the location of the person, place, or thing to be searched in sufficient detail.
- 4) Provide facts that allow the magistrate to reasonably infer that the object(s) of the warrant are present at the suspected premises at the time the warrant is issued.

32



## Search Warrant Probable Cause Affidavit 2

**Ask yourself:**  
“Could I find  
this person,  
place, or thing  
using the  
information  
found in the  
affidavit?”

33

## Search Warrant Procedure

### 1. Swear in the officer

- Raise your right hand and have the officer raise his/her right hand while facing you.
- Administer the oath.
- Have the officer sign the probable cause affidavit and search warrant application.

34

## Search Warrant Procedure 2

2. Review the probable cause affidavit and warrant application.

- Read each document.
- Determine whether there is probable cause to believe evidence of a particular crime is located at a particular location.
- Make sure the warrant does not authorize a general search or request to search for items you are not authorized to allow.

35

## Search Warrant Procedure 3

3. If probable cause exists:

- Sign and date the documents.
- State your office next to your signature if it is not included in the body of the warrant.
- If your official seal is not pre-printed on the forms, place your seal near each of your signatures.

36

## Arrest Warrant

- Complaint & probable cause affidavit
- Judge determines probable cause
- Warrant issued

## Search Warrant

- Probable cause affidavit
- Judge determines probable cause
- Warrant issued

37

## Who Prepares The Documents?

- Law enforcement **always** prepares the charging complaint and the probable cause affidavit.
  - You **cannot** create these documents.
- You, the judge, are legally responsible for preparing the **warrant**.
  - Often, the officer has already prepared the warrant and you just need to sign it.
  - This is fine as long as you **read** the warrant and make sure there is probable cause before signing it.

38

# Warrant Rules

- **Never** sign an arrest warrant without having first read the charging complaint and probable cause affidavit.
- If there is any kind of problem with any of the documents, refuse to sign unless and until the problem(s) is/are resolved.

39

# Warrant Rules 2

- **Never** go with officers to execute the warrant or help plan the execution of the warrant!
- You have no business out there and will be inviting trouble.

40

## Private Citizen Complaint

- Private citizen can file complaint directly with justice court
- If private citizen wants to file criminal complaint, best practice is to recommend they speak with a prosecutor or law enforcement agency

41

## Private Complaint Issues

- They still must establish probable cause
- Most private citizens do not know how to draft it properly
- If prosecutor is not interested in prosecuting the case, it will basically be impossible for defendant to be convicted

42

## Private Citizen Complaint 2

- If no probable cause, no case has been initiated
- If there is probable cause, assign the complaint a cause number, and summon defendant to enter a plea
- Court should notify the prosecutor of the filing

43

## Truancy Cases

- Party may file motion to dismiss because child has mental illness
  - If filed, court must temporarily stay proceedings
  - Must then determine if child has a mental illness
- Family Code 65.065(a)*

44

## Truancy Cases 2

### Court may:

- Consider motion, supporting documents, professional statements of counsel, and witness testimony
- And observe the child

*Family Code 65.065(a)*

45

## Mental Illness Defined:

“means an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that: (A) substantially impairs a person’s thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior.”

*Family Code 65.065(a) and Health & Safety Code 571.003(14)*

46

## Truancy Cases 3

- If probable cause exists that child has mental illness, court must dismiss the petition
- If probable cause does not exist that child has mental illness, court must continue with truancy proceedings

*Family Code Section 65.065(b)*

47

## How To Determine Probable cause

48



## Probable Cause - Definition

- Facts and circumstances that make it **more likely than not** that:
  - A certain person has committed, or is committing, a certain crime, or
  - A certain place contains specific items connected to a certain crime.
- Probable cause exists where the police have reasonably trustworthy information that causes a reasonable person to believe a particular person has committed or is committing an offense.

*Chapnick v. State, 25 S.W.3d 875*

49

## Magistrate's Determination

- Probable cause is established when it is determined by a neutral, detached, and independent magistrate that the accused **probably** committed the offense alleged.
- Is it more likely than not that the person did it?
  - Yes = probable cause
- It is more than a mere suspicion, but less than beyond a reasonable doubt.

*Carroll v. U.S., 267 U.S. 132*

50

# Burden of Proof

## Mere Suspicion

- A girl is in the makeup section of a store and looks nervous.

## Probable Cause

- A manager watches the nervous girl run out of the store then immediately checks the area where the girl was and discovers makeup is missing.

## Beyond A Reasonable Doubt

- Store surveillance video shows the girl putting the makeup in her purse.

51

# Magistrate's Determination

**You** make the decision on whether or not there is probable cause.

- Just because an officer says there is probable cause doesn't mean there is.
- Do not just trust what the officers says.
- Read the affidavit yourself.

52

# Determining Probable Cause

1. It is art, not science:

Probable cause is determined on a case-by-case basis, but there are rules to be followed.

2. Four corners rule:

If it is not in the affidavit, you do not know it.

Additional facts from the officer cannot be considered.

3. Finding of probable cause based only on facts:

Opinions and conclusions in the affidavit should be **ignored**.

53

# Determining Probable Cause 2

4. Hearsay can be included in the affidavit.

- Hearsay is information that comes from someone other than the person talking.

Example:

- Bob assaults Mary and during the assault Bob made a threatening comment.
- Mary tells the police the comment that Bob made.
- What Bob said is considered hearsay when Mary repeats it to the police.

54

5. If the crime involves theft, criminal mischief, or any offense where monetary loss is involved, the affidavit **must** state the value of the property stolen or damage caused.
- Cash/property stolen: Stating the amount and how the amount was determined is good enough.
  - Property damage: cost of repair or fair market value (if completely destroyed) and the method for determining value must be stated.

## Determining Probable Cause 3

55

## Determining Probable Cause 4

6. Confessions:
- If a confession by the accused (written or oral), plus the elements of the offense are in the affidavit, probable cause is established.
7. Long Narratives do not necessarily mean probable cause:
- A long narrative may give lots of details but still fail to state essential information such as how and where the information came from and may be full of opinions and conclusions.
  - Look for specifics: the affidavit should give facts about the who, what, when, where, why, and how of the crime.

56

## Determining Probable Cause 5

- 8. Totality of the Circumstances: Consider all the facts in the affidavit before making a decision.
- 9. Reasonable inferences: Use common sense.  
Do not be hyper-technical.
- 10. Legal wording not required: Fancy wording is not needed.  
Do not get worried about misspelled words, bad grammar.  
If it makes sense and you determine probable cause, it is fine.

57

## Objective Test For Probable Cause

- Means the facts and circumstances are to be evaluated on a reasonable person standard rather than based what the officer actually thought.
  - Do not look at the thoughts of the officer at the time
  - Look to what a reasonable person would think under similar circumstances

*Devenpeck v. Alford*, 543 U.S. 146 (2004).

58

# Anonymous Tips?

- They are allowed for warrantless arrests and complaints if:
  - supported by sufficient corroboration under totality of the circumstances
- Courts should consider:
  - Credibility of tipster
  - How the tipster knows the information
    - Complaints should say whether they are an eyewitness or based in hearsay
  - Reliability

59

# Stay Strong

- It is your signature, and it is the accused's constitutional rights. If you do not have probable cause, the arrest or search will be illegal.

60

## Remember, What Happens After Bad Warrants?

- Any search and/or confession that occurred after arrest would be **thrown out**.

~CCP Art. 38.23

61

## Probable Cause Practice

62

# Let's Dive In & Practice!

63

## Quiz 1

- An officer sees a blue Subaru Legacy that stops at a stop sign for more than 15 seconds. The officer is concerned with the pause and decides to pull the car over. As the officer approaches, he notices the driver's eyes shift side-to-side several times. The driver also exhibits shallow, quick breathing. The officer asks the driver several questions. The driver identifies himself, provides his license and registration, and then responds that he is taking the 5<sup>th</sup> and that he does not consent to any further questions or searches. The officer arrests the driver for obstructing a proper search. Was there probable cause for the warrantless arrest?
  - Yes, the facts establish that the driver intentionally prevented or obstructed the peace officer from conducting a search on his vehicle.
  - No, the facts do not establish probable cause that a crime was committed.

64



## Quiz 2

- Adam was detained at the Dallas International Airport by narcotics officers who believed he fit the general profile of a drug courier. The officers took Adam's I.D. and plane ticket and arrested him for drug possession. Was there probable cause for the warrantless arrest?
  - Yes, the facts establish that probable cause that Adam possessed illegal drugs.
  - No, the facts do not establish probable cause that a crime was being committed.

65

## Quiz 3

- Police received anonymous letter stating that Fred and Ginger were engaged in selling drugs and their house was full of drugs and drug money. The letter stated that Ginger would drive to Florida on May 3<sup>rd</sup> for the car to be loaded with drugs, and Fred would fly over a few days later to drive the car back with Ginger. Police investigated and saw that Ginger left the state, driving east, on May 3<sup>rd</sup>. Police were also able to verify that Fred had a plane ticket to Florida for May 5<sup>th</sup> flight, he took that flight, and stayed in a hotel with Ginger that night. Police submit to you a probable cause affidavit with above facts for a search warrant. Is there probable cause?
  - Yes, the anonymous letter was full of information that was correct up to this point and has been corroborated with other evidence.
  - No, probable cause cannot be established with mere anonymous tips.

66

## Rules for Practice--

Work with those at your table:

- Determine if probable cause exists
  - Look at Statutes Handout as needed
  - If yes, identify the facts that establish probable cause
  - If no, identify what facts are missing
- Nominate table spokesperson to share your answer!

67

- “On December 11, 2021, approximately 4:45 PM I, Rando County Deputy Bill Billson, responded to the 123 Cabezas Drive, for a domestic assault. The defender was identified as Dwayne Doe (W/M DOB: 12/21/1984). After looking at the victim’s (Anne Anneson) injuries, I saw four puncture wounds to her left arm and her description of the incident. I good reason to believe and do believe **Doe** committed the offense of Assault Family Violence (PC 22.01).”

Good or Bad Affidavit?

68

- “On December 11, 2021, approximately 4:45 PM I, Rando County Deputy Bill Billson, responded to the 123 Cabezas Drive, for a domestic assault. The defender was identified as Dwayne Doe (W/M DOB: 12/21/1984) and the victim was identified as Anne Anneson (W/M DOB: 02/03/1980) . The victim confirmed both parties live at the above residence. As part of the victim’s statements, she told me that they had an oral disagreement, during which Doe told her to be quiet and if she said one more thing, she’d be sorry. She said “one more thing”, and he took a fork off the counter and jammed it into her left upper arm. She said she started to cry and yell, and he told her that is what she gets for her smart mouth. I saw four puncture wounds to her left arm and her eyes were red and swollen during the interview.”

Better Example?

69

- “I officer, Joe Johnson, came on scene at 20:15 hrs and saw a suspect with his arm reaching into a Toyota sedan. As I approached, the suspect grabbed a bag from inside the vehicle and left on foot. I detained the suspect and identified him as Rob Rogers WM DOB 11/10/1995.”

Good or Bad Affidavit?

70

- I officer, Joe Johnson, came on scene at 20:15 hrs and saw a suspect with his arm reaching into what looked like a broken window on a Toyota sedan LP AB 1234. As I approached, the suspect grabbed a bag from inside the vehicle and ran down the street. I chased on foot and caught the suspect. I detained the suspect and identified him as Rob Rogers WM DOB 11/10/1995. In his possession was a black purse that's content included a driver's license for Amy Adams WF DOB 01/01/1988, \$200 cash, various credit cards with the name Amy Adams, and other miscellaneous items. I ran the license plate AB 1234, and the owner of the vehicle is listed as Amy Adams. I called and confirmed that Amy Adams owned the vehicle and had not given anyone permission to use her vehicle or purse.

Better Example?

71

“John Doe was operating a motor vehicle in a public place while intoxicated. To wit: John Doe was operating a 2000 Pontiac bearing the license plate SD 1234 on US HWY 281 while intoxicated. To wit: John Doe was in possession of 2 open bottles of corona beer. One bottle was located in the backseat on top of a 6 pack container, and another was located under the front passenger seat.”

Good or Bad Affidavit?

72

- “John Doe was operating a motor vehicle in a public place while intoxicated. To wit: John Doe was John Doe was operating a 2000 Pontiac bearing the license plate SD 1234 on US HWY 281. Upon speaking with John Doe, this officer could smell the odor of metabolized alcohol. John Doe was very unstable on his feet, slurring his speech, and had red, bloodshot eyes. John Doe informed this officer that he was not on any medications. John Doe admitted to drinking 2 beers at dinner prior to getting in the car. Upon looking in his vehicle, this officer located two open bottles of corona beer. One bottle was located in the backseat on top of a 6 pack container, and another was located under the front passenger seat. John Doe refused to perform any field sobriety tests”

Better Example?

73

Questions? Thank you!!!

John Lackey  
Staff Attorney  
Texas Justice Court Training Center  
[j.lackey@txstate.edu](mailto:j.lackey@txstate.edu)

74