

Unit Goal: Role of the peace officer and the rights of citizens regarding arrest

10.1. Define terminology associated with arrest.

- A. Penal Code Sec. 2.01 Proof Beyond Reasonable Doubt
- B. Probable Cause
 - i. There are two separate definitions of probable cause, one for search and one for arrest, because different types of information are required to establish probable cause in each instance:
 - 1. Probable Cause to Arrest: See *Brinegar v United States*, 338 US 160 (1949); Probable cause exists where the facts and circumstances within the officer's knowledge, and of which they have reasonable trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed.
 - 2. Probable Cause to Search: See *Carroll v. United States*, 267 U.S. 132 (1925); Probable cause to search exists when "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that [seizable property would be found in a particular place or on a particular person]
 - a. The probable cause test, then, must show that the facts and circumstances of the officer's knowledge are sufficient enough to warrant a reasonable person to believe a suspect has committed, is committing, or is about to commit a crime.
 - b. See *Beck v. Ohio*, 379 U.S. 89 (1964); (If subjective good faith alone (of probable cause) were the test, the protection of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police).
- C. Reasonable Suspicion
 - i. Mere suspicion: A hunch or the feeling of intuition. Although intuitively knowing something is undoubtedly a skill that serves law enforcement officers well, mere suspicion is insufficient proof of any fact in a court of law. (Criminal Procedure for the Law Enforcement Professional, 11th edition, Ferdico, Fradella, and Totten, Wadsworth Cengage Learning, 2013).
 - ii. See *US v. Sokolow*, 490 US 1 (1989); (Reasonable suspicion is based upon the totality of the circumstances and is less burden than Probable Cause.)
- D. Penal Code Sec. 2.02 Exception
- E. Penal Code Sec. 1.07(a)(42) Reasonable Belief

Lecture Scenario: Give a scenario where the student will be able to discuss probable cause.

Scenario #1:

An officer is responding to a call of a suspicious subject and arrives to find the subject still at the scene. There are several businesses in the area and the caller stated the subject had just burglarized a business in said area. The subject appears to be nervous, has what appears to be blood on their jacket, and is in possession of a bag containing a pry bar, screwdrivers, and a

large hammer. The officer observes that front glass of one of the businesses has been broken.

- Student must be able to articulate what is needed for probable cause.
- Student must be able to define probable cause: example, specific facts that lead a reasonable person to believe a specific person has committed a specific offense.
- Student must be able to articulate what actions from an officer turns a detention into an arrest. Example, moving an individual from the scene, handcuffing, placing a person in the back of a patrol car.

Scenario #2:

An officer observes a subject in a store parking lot looking into the windows of several parked vehicles. As the officer watches, the subject appears to be checking the vehicles to see if any are left unlocked but never makes entry into a vehicle. The subject is a juvenile around the age of sixteen years of age and the time is 1:00 PM on a day when school is not in session.

- Student must be able to define reasonable suspicion. Ex: articulable facts that lead a reasonable person to believe that a crime is occurring, just occurred, or is about to occur.
- Student must be able to articulate what is needed for an investigative detention under reasonable suspicion. Ex: why location and time of day do not provide reasonable suspicion on their own – must be combined with other factors.
- Student must be able to articulate factors on what can be done with reasonable suspicion – length of detention/ what can occur during a detention.
- Students must have an understanding that detentions must be ended when suspicion is dispelled (including ending a detention when officer has further questions if those questions do not amount to reasonable suspicion. Ex: Unable to positively identify the subject without reasonable suspicion of further criminal activity, wanting to make parents aware of a juvenile's activity).

Scenario #3:

Around 2200 hrs., an officer in their patrol unit passes a gas station that is well known for having beer runs. While on the side of the business, the officer observes a male in his 20's run from the front of the business with two 30 packs of beer. The male enters a car and drives off but does not commit a traffic offense. The officer conducts a traffic stop on the car two blocks away. The male advises that he bought the beer, but he lost the receipt. The officer tells the male that he needs to verify this by taking him to the gas station, however the driver objects to going back to the store with the officer. The officer advises that they will let him go if he is telling the truth. The officer has him sit, unhandcuffed, in the back of the patrol car. They drive him back to the gas station where they verify that no theft occurred. They subsequently return the driver to his vehicle and release him.

- Student must be able to articulate if the officer could conduct the traffic stop on the car without observing a traffic offense.
- Student must be able to articulate if and when the driver was arrested.
- Students must be able to articulate what the officer should or could have done.

Scenario #4:

An officer is dispatched to a subject drinking coffee at a local coffee shop. A customer calls and reports that the subject is reading a newspaper at a back table and has a handgun in a holster

on his belt. The customer reports that the customer being armed alarms them. The officer is dispatched to a subject with a gun call.

- Student discussion to demonstrate officers responding to a dispatched call (differentiate between calls that report a crime and those which do not).
- Discussion on officers dispatched to subject with a gun scenario
 - When does a subject with a gun amount to criminal activity
 - How to approach
 - Citizen rights vs. safety coming first.
- Officers dispatched to a subject lawfully carrying a firearm
 - Unable to detain subject (consensual encounters only)
 - Must weigh safety options (tactical approaches could turn encounter into a detention).
- Discussion on consensual encounters turning into a detention or arrest. Ex: the subject being informed by owner that they are no longer welcome at the business (criminal trespass) vs. a customer who is uncomfortable with a subject legally carrying a firearm.

10.2. Discuss the three classifications of interactions between peace officers and persons.

- A. Consensual Encounters: Peace officers are free to approach and ask questions of persons so long as officers recognize that those persons can refuse to identify themselves, refuse to cooperate, refuse to answer questions, and simply walk away. *Florida v. Royer*, 460 U.S. 491 (1983);
- B. Investigatory Stops/Detentions: The temporary seizure of a person for investigation based on an officer's reasonable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968).
- C. Arrests: Take persons into custody for purposes of charging them with a crime based on an officer's establishment of probable cause. *U.S. v. Mendenhall*, 446 U.S. 544 (1980).

10.3. Discuss actions a law enforcement officer can take having "mere suspicion."

- A. What can a peace officer do with mere suspicion?
 - i. Computer checks may be made of license plates.
 - ii. Surveillance may occur. Officers can lay back and watch the individual(s) or suspected activity for additional facts and circumstances that amount to more than mere suspicion.
 - iii. Officers can initiate a police-citizen encounter so long as the officer understands the persons approached do not have to identify themselves or answer the officer's questions and are free to walk away at any time.
 - iv. The officer's objective is to obtain articulable facts and circumstances that rise to the level of either reasonable suspicion that gives officers the power to detain or probable cause, which permits the officer to arrest.

10.4. Identify the necessary conditions for arrest.

- A. Intent – A peace officer's purpose or intention to take a person into the custody of the law.

- B. Authority – The peace officer’s arrest must be made under real authority. This means the officer is authorized by law to make an arrest and the arrest is supported by probable cause.
- C. Actual seizure – The person arrested is taken into custody either by physical force or by submission to assertion of authority.
- D. Understanding – by the person to be arrested of the officer’s intention to arrest.
 - i. Terry v. Ohio, 392 U.S. 1 (1968) – Investigative Detention
 - ii. Code of Criminal Procedure Art. 15.22 When a Person is Arrested
 - iii. Code of Criminal Procedure Art. 11.21 Constructive Custody
 - iv. Code of Criminal Procedure Art. 11.22 Restraint
 - v. Penal Code Sec. 38.01(1) Custody
 - vi. Code of Criminal Procedure Art. 15.17 Duties of Arresting Officer and Magistrate
 - vii. Code of Criminal Procedure Art. 14.01 Offense Within View
- E. Limited conditions to be met for either a peace officer or “any other person” to make a warrantless arrest and the conditions for only peace officers to make a warrantless arrest.
 - i. Code of Criminal Procedure Art. 14.02 Within View of Magistrate
 - ii. Code of Criminal Procedure Art. 14.03 Authority of Peace Officers
- F. Peace officers must be able to articulate specific facts and circumstances to justify an arrest regarding “suspicious places” and “circumstances”. See Dyar v. State, 125 SW3d 460 (Tex. Crim. App. 2003) which provides a detailed explanation of the statute.
 - i. Code of Criminal Procedure Art. 14.031 Public Intoxication
 - ii. Code of Criminal Procedure Art. 14.035 Authority to Release In Lieu of Arrest Certain Persons with Intellectual or Developmental Disability
 - iii. Code of Criminal Procedure Art. 14.04 When Felony Has Been Committed
 - iv. Code of Criminal Procedure Art. 14.05 Rights of Officer
- G. See Payton v. New York, 100 US 1371 (1980); (absent exigent circumstances, a peace officer may not make a warrantless entry into a suspect’s home to make a routine felony arrest)
 - i. Code of Criminal Procedure Art. 14.051 Arrest by Peace Officer from Other Jurisdiction
 - ii. Code of Criminal Procedure Art. 14.06 Must Take Offender Before Magistrate
 - iii. Code of Criminal Procedure Art. 14.03(b) Mandatory Arrest Authority for Violation of a Protective Order in the Officer’s Presence.
 - iv. Code of Criminal Procedure Art. 18.16 Preventing Consequences of Theft
 - v. Code of Criminal Procedure Art. 51.13 Uniform Criminal Extradition Act – Sec. 14 Arrest Without a Warrant
 - vi. 22 USC 254 Diplomatic Relations Act – Diplomatic Immunity
 - vii. Code of Criminal Procedure Art. 1.21 Privilege of Legislators

10.5. Discuss probable cause and arrest without warrant.

- A. An officer may arrest for that offense which the probable cause leads the officer to believe is occurring or has occurred. Whether or not probable cause was present to support an arrest or search is a question that will be resolved by the courts.

- B. The court will examine the “totality of the circumstances” surrounding the seizure or detention to determine if there were sufficient facts and circumstances present to satisfy the Fourth Amendment.
 - i. Only the information known to the officer at the time of the seizure or search will be considered by the court – any evidence found after the arrest or during the search will not be admissible to prove probable cause.
- C. Although the courts are the ultimate arbiters of what constitutes probable cause, the U.S. Supreme Court in the Gates opinion also stated: “Perhaps the central teaching of our past decisions bearing on the probable cause standard is that it is a practical, non-technical conception. In dealing with probable cause...as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men (peace officers), not legal technicians (attorneys), act.” Illinois v. Gates, 462 U.S. 213 (1983).

10.6. Discuss the issues surrounding custodial statements.

- A. Peace officers must respect the citizen’s right against self-incrimination as protected by the U.S. Constitution’s Fifth Amendment.
 - i. Therefore, persons in custody prior to interrogation must be clearly informed by peace officers that they have the right to remain silent and that anything they say can and will be used against them in court.
 - ii. These Miranda warnings also require peace officers to advise persons in custody prior to interrogation that they have the right to an attorney and that if they cannot afford an attorney, one will be appointed to represent them. Miranda v. Arizona, 384 U.S. 436 (1966).
- B. In circumstances where the person does not speak or understand English, or they are deaf/hard-of-hearing, an interpreter is brought in to read/translate the person’s Miranda rights so that the person can appropriately understand the rights that they are waiving by giving their answer. (See your department’s policies on using interpreters when making arrests.)
- C. Once persons in custody indicate their right to remain silent, interrogations must cease. If the persons in custody request an attorney, the interrogations must cease until an attorney is present or, alternatively, until there is at least a fourteen-day break in Miranda custody. Maryland v. Shatzer, 130 US. 1213 (2010).
 - i. Code of Criminal Procedure Art. 38.22 When Statements May Be Used
 - ii. See Creager v. State, 952 SW2d 852 (Tex. Crim. App. 1997)

10.7. Describe the basic criteria for obtaining, executing, and returning an arrest warrant.

- A. Arrest under warrant duties:
 - i. Code of Criminal Procedure Art. 15.01 Warrant of Arrest
 - ii. Code Of Criminal Procedure Art. 15.02 Requisites of Warrant
 - iii. Code Of Criminal Procedure Art. 15.03 Magistrate May Issue Warrant or Summons
 - iv. Code Of Criminal Procedure Art. 15.06 Warrant Extends to Every Part of the State
 - v. Code Of Criminal Procedure Art. 15.07 Warrant Issued by Other Magistrate
 - vi. Code of Criminal Procedure Art. 15.16 How Warrant Is Executed

- vii. Code Of Criminal Procedure Art. 15.17 Duties of Arresting Officer and Magistrate
- viii. Code of Criminal Procedure Art. 15.171 Duty of Officer to Notify Probate Court
- ix. Code Of Criminal Procedure Art. 15.18 Arrest for Out-Of-County Offense
- x. Code Of Criminal Procedure Art. 15.19 Notice of Arrest
- xi. Code Of Criminal Procedure Art. 15.20 Duty of Sheriff Receiving Notice
- xii. Code Of Criminal Procedure Art. 15.21 Release on Personal Bond If Not Timely Demanded
- xiii. Code Of Criminal Procedure Art. 15.22 When A Person Is Arrested
- xiv. Code Of Criminal Procedure Art. 15.23 Time of Arrest
- xv. Code Of Criminal Procedure Art. 15.24 What Force May Be Used
- xvi. Code Of Criminal Procedure Art. 15.25 May Break Door
- xvii. Code Of Criminal Procedure Art. 15.26 Authority to Arrest Must Be Made Known
- xviii. Code Of Criminal Procedure Art. 15.27 Notification to Schools Required

Instructor Note: Students should be informed of the limitations on executing third party arrest warrants found in *Steagald v. United States*, 101 US. 1642 (1981). *Steagald* stands for the proposition that entry may only be forced to execute an arrest warrant when the warrant is being executed at the residence where the person named in the arrest warrant lives.

10.8. Describe the basic criteria for warrantless search.

A. Warrantless Search Case Law

- i. Probable Cause and Exigent Circumstances.
- ii. See *Brigham City, Utah v. Smart*, 126 US 1943 (2006) (Exigent circumstances such as breaking up a violent fight permit warrantless entry into dwelling without a warrant).
- iii. See *Kentucky v. King*, 563 US 452 (2011) (Peace officers cannot create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, in this case, the officers did not create the circumstances, the reaction of the occupants of the apartment did).

Lecture Scenario: Given a scenario, the student will be able to identify whether or not the applicable authority exists for: Warrantless Search

- Exceptions to the warrant requirement- consent vs exigent circumstances
- consent.

Scenario #1:

An officer arrives at a residence to arrest a subject on a criminal warrant. The subject is arrested outside of their house, placed into the back of a patrol car, and approached by an officer who asks for consent to enter and search their residence. The subject grants verbal consent and an officer enters the residence to conduct a search while another officer stands by with the subject who is left secured in the vehicle.

- Students should understand that consent needs to be freely given. Students should be able to identify possible issues with the scenario in which a reasonable person might have felt they did not have the ability to refuse.
- The student should be able to articulate that the person granting consent must have the ability to withdraw: example, the subject must be allowed to accompany

the officers conducting the search in an area where they can tell the officer to stop the search.

- Student should determine that although written consent is better than verbal consent, written consent can still be challenged: example, in the above scenario leaving the subject in the car during the search could still make written consent invalid.

Scenario #2:

An officer is dispatched to a family fight. While investigating the incident the female half tells the officer that when she called the police her husband hid a bag of cocaine in the kitchen cabinet. Her husband is still at the scene and is being interviewed in the other room. The wife grants consent for the officer to search the drawer. Can the officer search the drawer to retrieve the cocaine?

- Student should identify who has standing to grant consent, example community property (can one spouse have an expectation of property from the other spouse).
- Student should discuss changes to consent if the scenario involved a parent/child (can a parent grant over the objection of a child).
- Student should be able to define consent for other special circumstances such as landlord/tenant.

Scenario #3:

An officer is dispatched to a 911 hang up at a residence around midnight on a Saturday. The officer makes contact and discovers that a 7-year-old girl is home alone. The officer smells the strong odor of marijuana when the girl opens the door. The girl states that her mom is not home since she went to church. The girl advises that she is the only person at the residence. The girl also advises that she dialed 911 on accident while trying to contact her mom. The girl tells the officer that her mom has been gone for at least 3 hours. The officer asks if he can enter the residence.

- Students should be able to articulate if they can enter the residence with or without the child's consent.
- Student should be able to articulate what they can and cannot do inside the home with only the child present.
- Students should be able to explain what can be seized under plain view. (must be located in an area where an officer has a lawful right to be and be immediately apparent as contraband).

B. Exigency

i. Code of Criminal Procedure Art. 14.05 Rights of Officer

1. 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 under warrant, except that an officer making an arrest without a warrant may not enter a residence to make the arrest unless:
 - a. a person who resides in the residence consents to the entry; or
 - b. exigent circumstances require that the officer making the arrest enter the residence without the consent of a resident or without a

warrant.

ii. Code of Criminal Procedure Art. 14.051 Arrest by Peace Officer from Other Jurisdiction

1. Fresh pursuit means a pursuit without unreasonable delay by a peace officer of a person the officer reasonably suspects has committed a felony.
2. A peace officer commissioned and authorized by another state to make arrests for felonies who is in fresh pursuit of a person for the purpose of arresting that person for a felony may continue the pursuit into this state and arrest the person.
3. Court Case: United States v. Santana, 427 U.S. 38 (1976).

Scenario #1:

An officer approaches a subject who appears to be under 17 years of age who is out after curfew at 2:00 am. The subject is also observed to be drinking a beer. When the officer approaches to detain the subject, they evade from the officer on foot, and run to an unlocked apartment and enter it without closing or locking the door.

- Student should be articulate why entry under fresh pursuit would be unreasonable serious offense (Felony) vs Misdemeanor.
- Students should discuss that an entry made into a residence even can be considered unreasonable even through an open door.

Scenario #2:

An officer observes a subject commit an armed robbery and flees from the scene. The officer begins to chase the individual and is joined in the pursuit. During the pursuit, the officer who initiated the pursuit falls down while the responding officer continues the pursuit. The subject runs into an apartment and closes the door.

- Student should be able to define what continuous example is: what constitutes a break in the pursuit if one officer begins a pursuit must that officer be the person who makes forced entry?

Scenario #3:

An officer working in plain clothes walks through an apartment complex and observes through slightly open curtains, two subjects weighing and separating what an officer believes to be cocaine.

- Student should be able to articulate the strength of officer's probable cause. Example: Actually, seeing a substance vs. being dispatched to narcotics dealing.
- Student should discuss the difference between the likelihood of evidence being destroyed- ability to destroy evidence does not equal likelihood of destruction, example: a drug dealer unaware of police presence not likely to destroy drugs even though it would be easy to do so- ex. narcotics detective making a drug buy and then leaving to secure a warrant.

Scenario #4:

An officer is dispatched to a family violence call. Upon arrival, the officer knocks on the door and receives no answer. The officer hears what he believes is screaming coming from the back of the residence.

- Students should articulate why an officer can make entry into a residence to prevent

further violence.

- Students should describe what can be done after entry is made and the offender is taken into custody. Exigency can justify entry into a residence but their continued presence in a residence can become unlawful.

Scenario #5:

An officer is dispatched to a suicidal subject. The comments state the subject called their sister and told her they were sorry, they had taken some pills, and did not want to live anymore.

Upon arrival, the officer encounters an unresponsive person/subject laying on the floor.

- Student should delineate what rights the officers would have to conduct a search of the residence. Example: looking for pill bottles, being able to look in areas where they can relate the search to a medical emergency.
- Student should be able to articulate how the areas where they are permitted to conduct a search would change, depending on the emergency, example: a gas leak or elderly fall victim.

10.9. Describe the basic criteria for search warrant.

- Code of Criminal Procedure Art. 18.01 Search Warrant
- Code of Criminal Procedure Art. 18.011 Sealing of Affidavit
- Code of Criminal Procedure Art. 18.02 Grounds for Issuance
- Code of Criminal Procedure Art. 18.021 Issuance of Search Warrant to Photograph Injured Child
 - See also Family Code Sec. 58.002 Photographs and Fingerprints of Children
- Code of Criminal Procedure Art. 18.0215 Access to Cellular Telephone or Other Wireless Communications Device
- Code of Criminal Procedure Art. 18.03 Search Warrant May Authorize Arrest
- Code of Criminal Procedure Art. 18.04 Contents of Warrant
- Code of Criminal Procedure Art. 18.05 Warrants for Fire, Health, And Code Inspections
- Code of Criminal Procedure Art. 18.06 Execution of Warrants
- Code of Criminal Procedure Art. 18.07 Days Allowed for Warrant to Run
- Code of Criminal Procedure Art. 18.08 Power of Officer Executing Warrant
- Code of Criminal Procedure Art. 18.09 Shall Seize Accused and Property
- Code of Criminal Procedure Art. 18.095 Seizure of Circuit Board of Gambling Device, Equipment, Or Paraphernalia
- Code of Criminal Procedure Art. 18.10 How Return Made
- Code of Criminal Procedure Art. 18.11 Custody of Property Found
- Code of Criminal Procedure Art. 18.22 Testing Certain Defendants or Confined Persons for Communicable Diseases

10.10. Discuss the difference between no knock search warrant vs knock and announce warrant.

- Purpose of “no knock” warrant allows officers to enter the premises without warning to occupants...to protect officers from being shot if occupants are known to be armed or to prevent disposal of contraband.

- B. Disadvantage of “no knock” warrant: Occupant may believe being attacked by home invaders and try to defend self.
- C. “Knock and announce” entry is designed to let occupants know its police that want to enter premises...they knock and announce presence and wait a reasonable amount of time. Both parties are less at risk if the door is opened peacefully.
- D. Disadvantage of “knock and announce”: Could give time for occupants to reach for weapons or destroy evidence.
- E. However, there is little difference in how it is carried out: in knock and announce, officers have to knock on door, but it does not specify how loud the knock and announcement has to be, nor how long they need to wait for response. So, the difference is just a few seconds.

10.11. Describe the basic court documents required to charge.

- A. Code of Criminal Procedure Art. 15.04 Complaint
- B. Code of Criminal Procedure Art. 15.05 Requisites of Complaint
- C. Probable Cause Affidavit: are sworn statements of a law enforcement officer that detail that single individual’s reasons or beliefs that the constitutional protections have been respected and that there are sufficient grounds to arrest someone for a violation of criminal law or to search their property and seize items that may be used as evidence of an offense. (Lowe, The importance of a probable cause affidavit in Texas Criminal Defense - Dallas justice blog, 1 December 2022).

10.12. Explain the bail procedure.

- A. Code of Criminal Procedure Art. 17.01 Definition of “Bail Bond”
- B. Code of Criminal Procedure Art. 17.033 Release on Bond of Certain Persons Arrested Without a Warrant
- C. Code of Criminal Procedure Art. 17.15 Rules for Setting Amount of Bail
- D. Code of Criminal Procedure Art. 17.152 Denial of Bail for Violation of Certain Court Orders or Conditions of Bond in a Family Violence Case
- E. Code of Criminal Procedure Art. 17.153 Denial of Bail for Violation of Condition of Bond Where Child Alleged Victim
- F. Code of Criminal Procedure Art. 17.20 Bail in Misdemeanor
- G. Code of Criminal Procedure Art. 17.21 Bail in Felony
- H. Code of Criminal Procedure Art. 17.22 May Take Bail in Felony
- I. Code of Criminal Procedure Art. 17.29 Accused Liberated
- J. Code of Criminal Procedure Art. 17.291 Further Detention of Certain Persons
- K. Code of Criminal Procedure Art. 17.292 Magistrate’s Order for Emergency Protection
- L. Code of Criminal Procedure Art. 56A.051 General Rights
- M. Code of Criminal Procedure Art. 56A.052 Additional Rights of Victims of Sexual Assault, Indecent Assault, Stalking, Or Trafficking