

Chapter 1 – Probable Cause

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Introduction

Probable cause is the most important and most often-used phrase in law enforcement. It is defined by the United States Supreme Court as more than bare suspicion; it exists when “the facts and circumstances within 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 an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160 (1949).

For purposes of day-to-day policing, probable cause is present if an officer has trustworthy evidence or information that is sufficient to make a “reasonable person” believe it is more likely than not that the proposed arrest or search is justified. In mathematical terms, probable cause exists if there is more than 50 percent certainty that the suspect has committed an offense or that the items sought can be found in a certain place.

Probable cause is used in four situations: arrests with a warrant, arrests without a warrant, searches of items with a warrant, and searches of items without a warrant. The definition of probable cause is the same in all four situations. The difference is that in arrests and searches with a warrant, probable cause has been determined by the judge or magistrate, thus the police officer does not have to prove it. In contrast, in arrests and searches without a warrant, the police officer has the burden of establishing probable cause in court if the validity of the arrest or search is later challenged.

The cases in this section contribute to an understanding of the meaning of probable cause. In reality, probable cause is subjective in that its precise meaning may vary from one person to another. In some cases, what constitutes probable cause to one judge or officer may not amount to probable cause to another. It is clear, however, that probable cause is likely to be strengthened by quantity, in addition to quality; meaning that the more articulable reasons an officer has, the greater the likelihood that probable cause will be found by the courts. Police officers are therefore advised to articulate as many specific reasons as they can to justify the arrest or search.

The leading cases briefed in this chapter on probable cause are *Draper v. United States* and *Illinois v. Gates*. A more recent case is *Devenpeck v. Alford*, which held that there is no requirement in the Fourth Amendment for the offense establishing probable cause for an arrest to be “closely related” to and based on the same conduct as the offense identified by the officer.

Draper v. United States 358 U.S. 307 (1959)

CAPSULE: Information from an informant that is corroborated by an officer may be sufficient to provide probable cause for an arrest even if such information is hearsay.

FACTS: A narcotics agent received information from an informant who had previously proven himself reliable, that Draper had gone to Chicago to bring three ounces of heroin back to Denver by train either the morning of September 8 or 9. The informant also gave a detailed physical description of Draper, the clothes he would be wearing, and that he habitually “walked real fast.” Based on this information, police officers set up surveillance of all trains coming from Chicago. The morning of September 8 produced no one fitting the informant’s description. On the morning of September 9, officers observed an individual, who matched the exact description the informant had supplied, get off of a train from Chicago and begin to walk quickly toward the exit. Officers overtook the suspect and arrested him. Heroin and a syringe were seized in a search incident to the arrest. The informant died prior to the trial and was therefore unable to testify. Draper was convicted of knowingly concealing and transporting drugs.

ISSUE: Can information provided by an informant, which is subsequently corroborated by an officer, provide probable cause for an arrest without a warrant? YES.

SUPREME COURT DECISION: Information received from an informant, which is corroborated by an officer, may be sufficient to provide probable cause for an arrest even though such information is hearsay and would not otherwise be admissible in a criminal trial.

REASON: The informant who provided information to the agent had provided reliable information in the past. When the agent personally verified each element of the informant’s detailed description, except the part involving the possession of drugs, he developed probable cause to believe that the rest of the informant’s description was true.

CASE SIGNIFICANCE: The evidence from the informant in this case could be considered hearsay, which ordinarily is inadmissible in a criminal trial. The Court said, however, that it could be used to show probable cause for purposes of a search; thus, evidence that may not be admissible in a trial may be used by the police to establish probable cause. This is important because all information from an informant is considered hearsay as the basis for police action, but the police can act on such information as long as it is good enough to establish probable cause. The Court held that there was probable cause in

this case because the information came from “one employed for that purpose and whose information had always been found accurate and reliable.” The Court added that “it is clear that [the police officer] would have been derelict in his duties had he not pursued it.”

Spinelli v. United States **393 U.S. 410 (1969)**

CAPSULE: To establish probable cause, an affidavit must meet the two-pronged test in *Aguilar v. Texas*. Failure to do so means that the warrant issued is invalid.

FACTS: The Federal Bureau of Investigation kept track of Spinelli’s movements for five days. On four of the five days, Spinelli was seen going into St. Louis, Missouri between 11:00 A.M. and 12:15 P.M. Spinelli was also seen parking his car at a specific apartment complex between 3:30 P.M. and 4:45 P.M., where he was also observed entering an apartment there on at least one occasion. A check of phone records revealed that the phone numbers to the apartment Spinelli was seen entering were the same as those identified by an informant as the phone numbers Spinelli was using in a bookmaking operation. Based on the informant’s tip, corroborated by the surveillance of Spinelli, the FBI filed an affidavit and secured a search warrant for the apartment. Spinelli was convicted of interstate travel in aid of racketeering based on evidence gathered pursuant to the warrant.

ISSUE: Did the affidavit by the FBI agent contain probable cause sufficient for the issuance of a search warrant? NO.

SUPREME COURT DECISION: The evidence of surveillance asserted in the affidavit is insufficient to constitute probable cause. Any information obtained from an informant must meet the two-pronged reliability test set down in *Aguilar*. This information did not meet either prong.

REASON: Government law enforcement officials must be allowed to use all available information at their disposal in identifying and apprehending criminal enterprises. “We believe, however, that the ‘totality of circumstances’ approach taken [here] . . . paints with too broad a brush. . . . There can be no question that the last item [the affidavit] mentioned, detailing the informant’s tip, has a fundamental place in this warrant application. Without it, probable cause could not be established. The first two items reflect only innocent-seeming activity and data. . . . Can it be fairly said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*’s tests without independent corroboration?” The Court said no.

CASE SIGNIFICANCE: This case illustrates the types of allegations in an affidavit that are insufficient to establish probable cause. It reiterates the two-pronged *Aguilar* test for probable cause if the information is given by an informant, namely: reliability of the informant and reliability of the informant's information. The *Aguilar* test, however, although still valid, has been modified by a subsequent case—*Illinois v. Gates*, 462 U.S. 213 (1983). Under *Gates*, the two-pronged independent test for establishing probable cause has been replaced by the “totality of circumstances test.”

Illinois v. Gates 462 U.S. 213 (1983)

CAPSULE: The two-pronged test for probable cause established in previous cases is abandoned in favor of the “totality of circumstances” test.

FACTS: On May 3, 1978, the Bloomingdale, Illinois Police Department received an anonymous letter containing the following statements: that Gates and his wife were engaged in selling drugs; that the wife would drive her car to Florida on May 3 to be loaded with drugs; that Gates would fly to Florida and drive the car back to Illinois; that the trunk would be loaded with drugs; and that Gates had more than \$100,000 worth of drugs in his basement. Acting on the tip, a police officer obtained Gates' address and learned that he had made reservations for a May 5 flight to Florida. Arrangements for surveillance of the flight were made with an agent of the Drug Enforcement Administration. The surveillance disclosed that Gates took the flight, stayed overnight in a hotel room registered in his wife's name, and left the following morning with a woman in a car bearing an Illinois license plate, heading north. A search warrant for Gates' house and automobile was obtained on the basis of the officer's affidavit setting forth the foregoing facts and a copy of the anonymous letter. When Gates arrived at his home, the police were waiting. A search of the house and car revealed marijuana and other contraband. Gates was charged with violating state drug laws and was convicted.

ISSUE: Did the affidavit and the anonymous letter provide sufficient facts to establish probable cause for the issuance of a warrant? YES.

SUPREME COURT DECISION: The two-pronged test established under *Aguilar* and *Spinelli* is abandoned in favor of a “totality of circumstances approach. The task of an issuing magistrate is to make a practical decision whether, given all the circumstances, there is a fair probability that the evidence of a crime will be found in a particular place.

REASON: “Unlike a totality of circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of

reliability (and unreliability) attending an informant's tip, the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate."

CASE SIGNIFICANCE: The two-pronged test for establishing probable cause in cases in which information is given by an informant is now replaced with the "totality of circumstances test, making it easier for police officers to establish probable cause for the issuance of a warrant. Under the two-pronged test as enunciated in *Aguilar v. Texas*, 378 U.S. 108 (1964), probable cause based on information obtained from an informant could be established only if the following were present: (1) reliability of the informant, and (2) reliability of informant's information. Both conditions must have been satisfied before probable cause could be established. In contrast, under the "totality of circumstances" test, probable cause may be established if, based on all the circumstances (including hearsay), there is a fair probability that contraband or evidence of crime will be found in a particular place. The *Gates* case still preserves the two-pronged test established in *Aguilar*, but it does not treat the two aspects separately and independently. Instead, the "totality of circumstances approach is used, meaning that whatever deficiencies there may be in one prong can be supplemented or overcome by the other, together with other available evidence.

United States v. Sokolow 490 U.S. 1 (1989)

CAPSULE: The totality of circumstances in this case established a reasonable suspicion that the suspect was transporting illegal drugs hence the investigative stop without a warrant was valid.

FACTS: Sokolow purchased two round-trip tickets for a flight from Honolulu to Miami under an assumed name. He paid for the tickets from a roll of \$20 bills that appeared to contain about \$4,000. He appeared nervous during the transaction. Neither he nor his companion checked their luggage. Additional investigation revealed that Sokolow had scheduled a return flight for three days later. Based on these facts, which fit a "drug courier profile (developed by the Drug Enforcement Administration), officers stopped the pair and took them to the DEA office at the airport, where their luggage was examined by a narcotics detection dog. The examination indicated the presence of narcotics in one of Sokolow's bags. Sokolow was arrested and a search warrant was obtained for the bag. No narcotics were found in the bag, but documents indicating involvement in drug trafficking were discovered. Upon a second search with the narcotics detection dog, narcotics were detected in another of Sokolow's bags. Sokolow was released until a search warrant was obtained the next morning. A search of the bag revealed

1,063 grams of cocaine. Sokolow was again arrested and charged with possession with intent to distribute cocaine.

ISSUE: Were the factors matching Sokolow to a “drug courier profile” sufficient to justify his stop and subsequent search without a warrant? YES.

SUPREME COURT DECISION: Taken together, the circumstances in this case establish a reasonable suspicion that the suspect was transporting illegal drugs, and therefore the investigative stop without warrant was valid under the Fourth Amendment.

REASON: Under the decisions in *Terry v. Ohio*, 392 U.S. 1 (1968) and *United States v. Cortez*, 449 U.S. 411 (1981), the totality of circumstances must be evaluated to determine probable cause for an investigative stop. Police officers may stop and briefly detain an individual in order to determine whether they are involved in a criminal activity if the officer has reasonable suspicion, supported by articulable facts, that such activity is occurring.

CASE SIGNIFICANCE: This case addresses the issue of whether the use of “drug courier profiles” is valid under the Fourth Amendment. The Court said that there is nothing wrong with such use in this case because the facts, taken in totality, amounted to reasonable suspicion that criminal conduct was taking place. The Court indicated that whether the facts in this case fit a “profile” was less significant than the fact that, taken together, they establish a reasonable suspicion. In sum, the case appears to indicate that while a drug courier profile might be helpful, the totality of the circumstances is more important in establishing the legality of the stop and subsequent search.

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

CAPSULE: The Fourth Amendment does not require the offense establishing probable cause for an arrest to be “closely related” to and based on the same conduct as the offense identified by the officer during the initial encounter.

FACTS: Alford pulled behind a disabled vehicle, activating wig-wag headlights. A patrol car passing in the opposite direction turned around to assist. When the officer arrived on the scene, Alford hurriedly returned to his vehicle and drove away. The officer radioed his supervisor, Devenpeck, that he was concerned Alford was a police impersonator. The officer pursued Alford’s vehicle and pulled it over. Upon approaching Alford’s vehicle, the officer observed Alford was listening to a police scanner and had handcuffs in the car. When Devenpeck arrived, he questioned Alford and received evasive answers. Devenpeck then noticed a tape recorder in the seat with the record

button activated. Alford was removed from the vehicle and Davenpeck confirmed Alford was recording the conversations. Based on a conversation between Devenpeck and the prosecutor, the officers arrested Alford for violating the Washington State Privacy Act instead of impersonating a police officer. A state court dismissed the case because there was a court case overturning the Privacy Act. Alford filed a § 1983 suit against the officers for unlawful arrest and imprisonment.

ISSUE: Is an arrest “lawful under the Fourth Amendment when the criminal offense for which there is probable cause to arrest is not ‘closely related’ to the offense stated by the arresting officer at the time of the arrest”? YES.

SUPREME COURT DECISION: For an arrest to be constitutional, there is no requirement in the Fourth Amendment for the offense establishing probable cause for an arrest to be “closely related” to and based on the same conduct as the offense identified by the officer.

REASON: The Court based the finding in this case on three principles. First, given the complexity of the law governing what constitutes a particular crime, officers are not required to know exactly what law matches the behavior for which an arrest is made. He or she may arrest under one provision of the law, then, upon further investigation by the officer or prosecutor, it may be determined that the actions actually are more appropriate for a different offense. Second, the Court, relying on previous cases (specifically *Whren v. United States*) reiterated their precedent that the officer’s state of mind is not a factor in establishing probable cause. The Court held that the “closely related rule” violated this precedent because it would make the arrest rely on the motivation of the officer. Finally, while the Court recognized that it is “generally good practice to inform a person of the reason for his arrest at the time he is taken into custody,” that is not a requirement of law.

CASE SIGNIFICANCE: This case gives officers some flexibility in determining the offense to be charged after an arrest. In this case, had the first officer arrested Alford based on the initial encounter, it would have been for impersonating an officer. After Police Supervisor Devenpeck arrived, the situation changed and Devenpeck ordered the officer to arrest Alford for violating the Washington State Privacy Act. The Court ruled that even though the final charge was overturned (because a state court had declared the Washington State Privacy Act invalid), the officers were justified in making an arrest because probable cause was present (although for the different offense of impersonating an officer) at the time of the initial encounter. The fact that the law under which the suspect was finally charged was invalid and did not closely resemble the initial suspicion of the police did not make the arrest unconstitutional because the police had probable cause to make the arrest, although for a different crime. This case was filed against the officers by

Alford for civil liability (42 U.S.C. § 1983), alleging a violation of his constitutional right against unreasonable search and seizure. In these types of cases, an officer is not liable unless the constitutional right was “clearly established” at the time of the violation. The Court ruled that the “closely related offense” doctrine was not clearly established at the time of the officer’s arrest of Alford because lower courts differed on its application. As a result, the officers were not civilly liable under federal law.

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