



Attachment 1
RS 27355
1/22/2020

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

June 26, 2019

Senator Grant Burgoyne
Idaho Senate
Capitol Building
Boise, Idaho 83720

RE: Warrantless misdemeanor arrests outside presence of law enforcement

Senator Burgoyne,

You posed the following question to our office regarding the constitutionality of warrantless misdemeanor arrests that take place outside the presence of law enforcement officers under the United States Constitution.

QUESTION PRESENTED

[W]hether the United States Constitution permits warrantless misdemeanor arrests, by a law enforcement officer, for incidents outside of a law enforcement officer's presence.

BRIEF ANSWER

Probably. While the United States Supreme Court has not issued a definitive opinion directly on point, other courts have reached a consensus that the United States Constitution does not require an offense be committed in an officer's presence in order to authorize a warrantless arrest. Rather, the test for constitutionality of arrest under the Fourth Amendment is whether the officer had probable cause to believe that an offense has been committed and the arrestee committed it.

ANALYSIS

A warrantless arrest satisfies constitutional standards if it is based upon probable cause.

Probable cause is sufficient to justify an arrest. See Whren v. United States, 517 U.S. 806, 819 (1996); Virginia v. Moore, 553 U.S. 164, 168 (2008).

We are convinced that the approach of our prior cases is correct, because an arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure. Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation.

Moore, 553 U.S. at 168 (citing Whren, 517 U.S. at 817; Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); W. LaFave, *Arrest: The Decision to Take a Suspect into Custody*, 177–202 (1965)). In Moore, while the United States Supreme Court noted, “In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable,” id. at 171, it also “adhere[d] to the probable cause standard [for warrantless arrests],” id. at 175. In fact, the Supreme Court has never specifically addressed whether a warrantless arrest requires the offense be committed in the officer’s presence. See Atwater, 532 U.S. at 340 n.11 (“We need not, and thus do not, speculate whether the Fourth Amendment entails an “in the presence” requirement for purposes of misdemeanor arrests. Cf. Welsh v. Wisconsin, 466 U.S. 740, 756, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (White, J., dissenting) (“[T]he requirement that a misdemeanor must have occurred in the officer’s presence to justify a warrantless arrest is not grounded in the Fourth Amendment”).

However, other courts that have discussed the issue have reached a consensus that any “presence” requirement is based on statutory, not constitutional, requirements.

As for the second Fourth Amendment issue regarding warrantless misdemeanor arrests, whether the “in presence” requirement is constitutional in nature, the consensus is that the answer here is also no. Though the Supreme Court has asserted that “warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime,” it has never held that a warrant for lesser offenses occurring out of the presence of an officer is constitutionally required.

W. LaFave, 3 *Search & Seizure* § 5.1(b) (5th ed., 2017); see also W. LaFave, 3 *Search & Seizure* § 5.1(c) (5th ed., 2017) (the presence test is not mandated by the Fourth

Amendment); Welsh v. Wisconsin, 466 U.S. at 756 (authority to make warrantless arrests, including outside the presence of an officer, may be enlarged by statute) (White, J., dissenting).

Many federal circuits concur that the “in the presence” requirement relies upon state law. For example, the Seventh Circuit found an “overwhelming consensus” of circuit courts have declined to adopt an “in the presence” requirement to justify a warrantless misdemeanor arrest. See Woods v. City of Chicago, 234 F.3d 979, 994-995 (7th Cir. 2000); see also United States v. McNeill, 484 F.3d 301, 311 (4th Cir. 2007) (court did not address specific question whether the Fourth Amendment required an offense occur in officer’s presence, but cited prior circuit case law declining to find such a Constitutional requirement); Pyles v. Raisor, 60 F.3d 1211, 1215 (6th Cir. 1995) (Fourth Amendment only requires arrest be based on probable cause and contains no “presence” requirement); Fields v. City of South Houston, 922 F.2d 1138, 1189-1190 (5th Cir. 1991) (while states may impose greater requirements, Fourth Amendment only requires probable cause for arrest). Likewise, the Ninth Circuit has long recognized that, while state law may require an offense be committed in the officer’s presence to justify a warrantless misdemeanor arrest, the requirement was not rooted in the Fourth Amendment. Barry v. Fowler, 902 F.2d 770, 772 (9th Cir. 1990).

Some state courts have also determined that the Fourth Amendment includes no “in the presence” requirement. See, e.g., State v. Walker, 138 P.3d 113, 119 (Wash. 2006) (“We can find no cases from this state or any other state, nor any statutes or other laws that support the argument that a person’s private affairs encompass the constitutional right to be free from warrantless misdemeanor arrests. So long as legislative authority exists and any such arrest is based on probable cause, the arrest is valid”); State v. Harker, 240 P.3d 780, 786-787 (Utah 2010) (warrantless misdemeanor arrest passed constitutional muster based on probable cause notwithstanding additional state statutory requirements). In light of the foregoing cases, it is likely that warrantless misdemeanor arrests, based on probable cause and authorized under state law, would satisfy the United States Constitution’s prohibition against unreasonable searches and seizures embodied in the Fourth Amendment.

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I hope you find this analysis useful. Should you have any additional questions, please feel free to contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kristina M. Schindele', with a long horizontal flourish extending to the right.

KRISTINA M. SCHINDELE
Deputy Attorney General