Attachment 2
Burgoyne
3-13-2020 SJR104

AG letter pages 1-6

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.

Criminal Law Division
P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8074
Located at 700 W. State Street
Joe R. Williams Building, 4th Floor

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.

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

Sincerely,

KRISTINA M. SCHINDELE
Deputy Attorney General

Troubling and difficult questions:

- **What does it mean for a misdemeanor to occur "outside an officer's presence"? (Clarke p. 4)**
- **What does it mean for an officer to witness a "completed misdemeanor"? (Clarke p.9)**

<u>**Scenario A**</u>

Man A walks into a bar. Man B seated on a bar stool gets up, goes to Man A, confirms the identity of Man B and punches him knocking him to the floor. An officer is called and responds.

1. Man B and five other people in the bar tell the officer they saw Man A hit Man B. May the officer arrest Man A for misdemeanor battery under Clarke? (no, the crime occurred outside the officer's presence and was "completed" before the officer arrived); under the amendment? (yes, there is probable cause)?

2. Man B and five other people in the bar at the time the punch was thrown tell the officer that in addition to seeing Man A hit Man B, Man A then said to Man B "when your friend Man C gets here, there'll be a punch for him too." May the officer arrest Man A for misdemeanor battery under Clarke? (no, the crime occurred outside the officer's presence; but was the crime completed outside the officer's presence? As to Man B, yes, as to Man C, no crime has yet occurred); under the amendment? (yes, there is probable cause as to man B; as to Man C?)?

3. Assume # 1, plus the officer questions Man A who states: "I did it. Man B has had that punch coming since he shoved me at recess in the 1st grade, and I owe him three more, so it's one down and three to go." May the officer arrest Man A under Clarke? No; under the amendment, yes.

Scenario B

Man B and the bartender are the only ones in the bar. Man A walks in and Man B punches him knocking him to the floor. The bartender calls an officer who responds. Man A and the bartender tell the officer that Man B hit Man A. The officer sees that Man A's nose is bleeding and appears broken. The officer questions Man B who denies hitting Man A. On questioning Man A admits he is right handed, and states that his right hand is bandaged and wrapped in ice because he injured it when he earlier punched the bar's concrete wall. The Bartender denies that Man B only asked for the bandage and ice after hitting Man A. The officer asks Man A to leave the bar, but Man A refuses stating he has unfinished business there. Can the officer arrest Man B under Clarke? No, the only crime was committed "outside the officer's presence" and was "completed" before the officer arrived. Can the officer arrest Man B under the amendment? Yes, there is probable cause based on the statements of Man A and the bartender and there is physical evidence of an altercation consistent with those statements. Consequently, there is probable cause to arrest Man B. Such an arrest is consistent with Clarke's recognition of the

virtues of permitting officers to diffuse potentially violent situations, but it is nonetheless prohibited by Clarke's ruling. I don't think the bartender wants the officer leaving the scene without making the arrest, and I don't think we do either.