Denver Law Review

Volume 43 | Issue 3 Article 6

January 1966

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THE EVOLUTION OF THE POLICE OFFICER'S RIGHT TO ARREST WITHOUT A WARRANT IN COLORADO

THE history of Colorado law concerning the rights and liabilities of an officer in making an arrest without a warrant can best be described in one word — bewildering. This state of affairs has been brought about by at least three factors:

1. Reliance upon ill-defined and partially out-moded common law with a paucity of interpretative cases;
2. Attempts to mend the common law with a statutory patchwork that is less than complete;
3. Unexplained legislative adoption of an Illinois statute[1] without mentioning, in the Colorado statute's legislative history, whether the Illinois interpretative case law was also adopted.[2] This omission may have significant ramifications.

It is the purpose of this Note to show the past and present status of the law and the pitfalls to be overcome in the further development of the police officer's right to arrest without a warrant.

The problem of determining what constitutes an arrest is outside the scope of this discussion and therefore it shall be assumed that an arrest has actually been made.

I. THE 19TH CENTURY EVOLUTION OF ARREST WITHOUT A WARRANT IN COLORADO

At the outset of its statehood, Colorado officially adopted the English Common Law:[3]

> The common law of England, so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First [1607] . . . shall be considered as of full force until repealed by legislative authority.[4]

Therefore, any omission in the area of Colorado arrest law *may* be supplied by the common law. "May" is appropriate because, as the cases construing the above statute indicate,[5] it is not always easy to

[1] *Compare* COLO. REV. STAT. § 39-2-20 (1963), *with* ILL. REV. STAT. ch. 38, § 342 (1874).

[2] COLO. SENATE LEGISLATIVE JOURNAL 1078, S. Bill No. 251 (1955).

[3] COLO. REV. STAT. ch. 16, § 1 (1868).

[4] COLO. REV. STAT. § 135-1-1 (1963).

[5] See the cases annotated under COLO. REV. STAT. § 135-1-1 (1963).

determine when the common law is "applicable and of a general nature."

Before going on to specific Colorado statutory and case law it will be useful to review the basic rudiments of the common law regarding a policeman's right to arrest without a warrant. No attempt will be made to discuss the technical and complicated distinctions of the common law,[6] but rather the basic majority rules will be skimmed:

1. An officer could arrest for a felony or a breach of the peace committed in his presence, or to prevent the immediate commission of such a crime.[7]
2. Regarding out-of-presence crimes, an officer could arrest only for a felony and then only when he had reasonable grounds for believing that a felony had been committed and that the person arrested was guilty of the felony.[8] If the officer were mistaken as to the commission of the crime or as to the person arrested, he would still be exempt from liability if his actions were based on "reasonable cause."
3. For a misdemeanor not amounting to a breach of the peace, the majority common law rule was that an officer could not arrest without a warrant regardless of whether it was perpetrated in or out of his presence.[9]

Turning to specific statutory law, Colorado first delineated an officer's responsibility in this area by adopting an arrest-without-a-warrant statute in 1861.[10] This statute, as it was originally enacted, still stands today. It reads:

> When any felonious offense shall be committed, public notice thereof shall be immediately given in all public places near where the same was committed, and fresh pursuit shall forthwith be made after every person guilty thereof by sheriffs, coroners, constables, and all other persons who shall be by any of them commanded or summoned for that purpose.[11]

The statute is as significant for what it does not say as for what it does say. For example, the specific reference to "felonious," by implication, excludes misdemeanors from its scope. Furthermore, the statute makes it the officer's duty to engage in fresh pursuit. Nothing is said about the common law right of an officer to arrest on "reasonable grounds" for a long-past felony not committed in his presence; nor is anything specifically mentioned concerning breaches of the peace.

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[6] PROSSER, TORTS § 26, at 134 (3d ed. 1964).

[7] *Id.* at 135.

[8] *Ibid.*

[9] *Id.* at 136.

[10] Colo. Sess. Laws 1861, § 157, at 326.

[11] COLO. REV. STAT. § 39-2-2 (1963).

These unanswered questions were at least partially settled by the 1891 case of *Union Depot & R.R. v. Smith.*[12] The defendant arrested the plaintiff for violating a city ordinance in the defendant's presence. The defendant, claiming to be a duly appointed police officer, contended that he had the right without a warrant to arrest a person committing a misdemeanor in his presence. The court, after concluding that the defendant was not a police officer, said:

> It is otherwise with an officer. He may arrest when he has reasonable grounds to suspect that a felony has been committed, and justify by proof of a ground which the law deems reasonable. . . . This rule has never been extended so as to protect the officer in case of an arrest for misdemeanor. . . . Where the rights of a police officer to arrest for a misdemeanor have been conceded, it has not been held to include an authority broad enough to embrace arrests for violations of municipal ordinances. To justify the arrest by an officer for an offense of this description, a statute must be found clothing the officer with the right, which must be exercised under the circumstances designated by the enactment. . . . A statute upon this subject has been enacted in this state, and doubtless a policeman would be authorized to make an arrest for a violation of a municipal ordinance where the offense was committed in his presence.[13]

The 1877 statute referred to in the *Union Depot* case stated, "The duty of the chief and other officers of the police . . . shall be, to apprehend any and all persons in the act of committing any offense against the laws of the state or ordinance of the city. . . ."[14] This statute plus the *Union Depot* interpretation extended the officer's common law right by allowing him to arrest for a misdemeanor, or breach of a city ordinance committed in his presence.

Five years later in *Newman v. People,*[15] the court reinforced these rights by saying:

> Indeed were this statute not in existence, it would be, as we have already intimated, the official duty of the sheriff, where he knows or sees that a criminal offense is being committed, without warrant, and upon view, to arrest the offender and to seize and take into custody the subject of the crime. . . .[16]

These changes reflect a growing awareness of the impracticality of distinguishing between a felony and a misdemeanor for purposes of arresting without a warrant.[17] This impracticality is illustrated by Colorado's shoplifting statute.[18] Shoplifting articles valued at less than one hundred dollars is a misdemeanor on the first or second offense while shoplifting articles worth more than that amount is a fel-

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[12] Union Depot & R.R. v. Smith, 16 Colo. 361, 27 Pac. 329 (1891).

[13] *Id.* at 365, 27 Pac. at 331.

[14] COLO. GEN. LAWS ch. 100, § 77 (1877).

[15] Newman v. People, 23 Colo. 300, 47 Pac. 278 (1896).

[16] *Id.* at 310, 47 Pac. at 282.

[17] PROSSER, *op. cit. supra* note 6, at 136.

[18] COLO. REV. STAT. § 49-5-29 (1963).

ony.[19] If it had been illegal to arrest for an "in presence" misdemeanor, an officer seeing a man grasping a wristwatch and running away from a shopkeeper would have been faced with a difficult decision. If he had arrested and the watch had been worth less than one hundred dollars, he probably would have arrested for a misdemeanor which was beyond his authority; if the watch had been worth more than one hundred dollars, the officer would not only have had a right but a duty to arrest. The avoidance of this type of problem by granting the officer the right to arrest for an in-presence misdemeanor is a logical expansion of his common law right, necessary because of the present-day difficulty in readily determining whether an offense is a felony or a misdemeanor.

However, at this point in Colorado history, the necessity of distinguishing between a felony and a misdemeanor remained as to out-of-presence offenses since neither the statute nor the case law extended to the officer the right to arrest for out-of-presence misdemeanors or violations of city ordinances.

By the turn of the century, the police officer's rights and liabilities regarding arrest, as declared by the common law plus statutory and case modification, were as follows:

1. Concerning a felony, the same rights existed as at common law. He could arrest whether the crime was committed within or without his presence, and he was not liable if his mistake as to the person or commission of the crime was "reasonable."
2. Contrary to the majority common law rule, the officer had the right to arrest for violations of city ordinances and misdemeanors committed in his presence. However, without a warrant he could not arrest for these same offenses when they were committed out of his presence.
3. Since the statute enlarging the common law right to arrest for in-presence crimes said nothing about the corresponding liabilities,[20] it is not clear whether the officer would be immune from liability for a reasonable mistake as to the person arrested or the commission of the misdemeanor. Since this immunity from liability did not exist at common law and statutes in derogation of the common law are strictly construed,[21] it seems likely that the officer mistakenly but reasonably arresting for a misdemeanor would have been liable. The practical ramifications of this result are again

[19] *Ibid.*

[20] COLO. GEN. LAWS ch. 100, § 77 (1877).

[21] Stowell v. People, 104 Colo. 255, 258, 90 P.2d 520, 521 (1939).

illustrated by the shoplifting hypothetical. If the officer had been "reasonably wrong" as to the actual commission of the crime or the guilt of the person arrested, and the watch had been worth more than one hundred dollars, he would not have been liable. If, on the other hand, the watch had been worth less than one hundred dollars, he would have been liable unless it were the shoplifter's third offense.

At the turn of the century, while Colorado had made some progress toward more realistic and workable laws in the area of arrest, important problems and questions remained unsolved.

II. RECENT RAMIFICATIONS

The first significant changes resulted from the enactment of a 1955 statute which reads:

> [A]n arrest may be made by an officer or by a private person without warrant, for a criminal offense committed in his presence; and by an officer, when a criminal offense has *in fact* been committed, and he has reasonable grounds for believing that the person to be arrested has committed it.[22] (Emphasis added.)

Before analyzing the effect of this statute, one source of justifiable confusion must be removed. The 1955 case of *Johnson v. Enlow*,[23] although mentioned in the annotation following this statute,[24] is merely a restatement of the law existing prior to its enactment;[25] it is *not* an interpretation of the statute.

The use of the word "criminal" rather than "felonious" in the statute is very significant because "criminal offense," as defined by Colorado case law, includes misdemeanors[26] and violations of city ordinances[27] as well as felonies. Thus the statute established the right of an officer to arrest for a misdemeanor or violation of a city ordinance committed *without* as well as within his presence. No longer is the officer taking the risk of arresting a person for an offense committed out of his presence which later turns out to be a misdemeanor. Furthermore, regardless of the type of offense committed, the officer is now relieved from liability for mistakenly arresting the wrong person if he had reasonable cause for believing the person was the guilty party, provided the offense was *in fact*

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[22] COLO. REV. STAT. § 39-2-20 (1963).

[23] Johnson v. Enlow, 132 Colo. 101, 286 P.2d 630 (1955).

[24] *Ibid.*

[25] The cause of action in the *Johnson* case arose in 1952 while the statute wasn't enacted until 1955. In addition, neither the attorneys' briefs nor the supreme court's decision mentioned the statute.

[26] Hoffman v. People, 72 Colo. 552, 558, 212 Pac. 848, 851 (1923).

[27] Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958).

committed. This holds true whether the misdemeanor was committed within or without the officer's presence. In these areas the statute makes needed progress in enlarging the officer's right to arrest.

In spite of this progress, the statute raises vitally important questions. One problem, beyond the scope of this paper, results from the fact that the ordinary citizen's right to arrest without a warrant has been radically increased.[28] The plain words of the statute indicate that a citizen may arrest for any "in-presence" criminal offense.[29]

Remembering that "criminal offense" encompasses felony, misdemeanor and a violation of a city ordinance, the plain words of the statute confer the right on one citizen to arrest another, when an offense has been committed in his presence, for making too much noise and thus disturbing the peace, for failing to license a dog or for over-parking!

A second problem, and one of great consequence to the police officer, is the fact that the plain words of the statute require that the offense must *in fact* have been committed in order to justify the arrest, thereby invalidating the old common law rule that an officer need have only reasonable grounds for believing that a felony had been committed.[30] Not only is this change clearly contrary to the great weight of American authority,[31] but it also places an enormous and unrealistic burden on the arresting officer, as illustrated by the following hypothetical: An officer happens into a dark alley and finds a known criminal going through the pockets of an unconscious well-dressed man. The criminal is caught and arrested. Several days later it is learned that the man suffered a heart attack and injured himself in the fall. The man testifies that he asked the criminal to get his digitalis pills from his pocket. It is clear that there was reasonable cause to believe an offense had been or was being committed; yet, because no offense was *in fact* committed, the officer is subject to civil liability for false arrest.

A third problem, that of statutory construction, is raised in determining the ramifications of the "in fact" language of the statute. It is possible that the "in fact" words of the statute can be circumvented, as has been suggested,[32] by holding that the legislature intended that an officer's common law immunities would sur-

[28] PROSSER, *op. cit. supra* note 6, at 135.

[29] COLO. REV. STAT. § 39-2-20 (1963).

[30] PROSSER, *op. cit. supra* note 6, at 135.

[31] 5 AM. JUR. 2d *Arrest* § 25 (1962).

[32] Scott, *Criminal Law and Procedure, Highlights of the 1955 Legislative Session*, 28 ROCKY MT. L. REV. 69 (1956).

vive and that the statute would merely extend additional rights. On the other hand, the statute's unequivocal "in fact" language and the absence of any language preserving the officer's immunities[33] seem to counterbalance the strict construction accorded to statutes in derogation of the common law.

Ultimately, the question of statutory construction must be resolved by determining the legislative intent. In determining this intent, the legislative history of the statute is vitally important. Colorado Revised Statutes, section 39-2-20 (1963) is an adoption of an 1874 Illinois statute.[34] When Colorado adopts the statute of a sister state, a presumption arises that it also adopts the sister state's interpretative case law existing at the time of the adoption.[35] This may be a particularly strong presumption when an Illinois statute is adopted.[36] If this presumption holds, the Illinois case law manifests the Colorado legislative intent. Unfortunately, because Colorado keeps only minimal records of the legislative history leading to the enactment of its statutes, there is no competent evidence supporting or rebutting this presumption.[37]

In 1964 the latter two problems were squarely met by the defendant's brief in the Colorado case of *Boyer v. Elkins*.[38] The Boyer brothers, defendants in a civil suit, were being sued for assault and battery of two police officers who had attempted to arrest them for misdemeanors and city ordinance violations committed out of the officers' presence. The Boyers' counsel did not dispute the officers' right to arrest for violation of a city ordinance or misdemeanor that was *in fact* committed out of their presence.[39] Instead, they argued that the arrest was illegal because they had not committed any offense before the attempted arrest, and that the statute clearly states the arrest is only legal if a "criminal offense" has *in fact* been committed. Therefore, because the arrest was illegal, they claimed

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[33] COLO. REV. STAT. § 39-2-20 (1963).

[34] ILL. REV. STAT. ch. 38, § 342 (1874).

[35] Hoen v. District Court, 412 P.2d 428, 430 (Colo. 1966); Warner v. People, 71 Colo. 559, 208 Pac. 459 (1922); Russell v. Jordan, 58 Colo. 445, 447, 147 Pac. 693, 694 (1915).

[36] Hoen v. District Court, 412 P.2d 428, 431 (Colo. 1966); Hallett v. Alexander, 50 Colo. 37, 50, 114 Pac. 490, 495 (1911); Houlahan v. Finance Consol. Min. Co., 34 Colo. 365, 368, 82 Pac. 484, 485 (1905); Bradbury v. Davis, 5 Colo. 265, 269 (1882).

[37] COLO. SENATE LEGISLATIVE JOURNAL 1078, S. Bill No. 251 (1955). It is interesting to note that the late Senator Wilkie Ham, a co-sponsor of the statute, was formerly an Assistant U.S. Attorney in Illinois for six years. Senator Ham also taught criminal law and evidence for six years at Marshall Law School in Chicago. It is hard to resist the conclusion that Senator Ham was aware of the Illinois interpretative case law existing at the time he sponsored the statute. Colorado Legislative Directory at 28 (1963).

[38] Brief for Appellant, p. 34, Boyer v. Elkins, 154 Colo. 294, 390 P.2d 460 (1964).

[39] *Ibid.*

the defendants were within their rights in resisting the officers. Furthermore, the defendants vigorously stressed that reasonable grounds for believing an offense had been committed was not enough to justify an arrest.[40] Authority for this contention was based on the construction problem raised by the statute. The defendants argued:

> C.R.S. 39-2-20 . . . apparently was copied from the Illinois law . . . . The construction placed on this statute by the Illinois courts prior to the enactment of the same statute in Colorado in 1955 is entitled to great weight and is at least strongly persuasive upon the courts of this state for the reason that the presumption is that the law was enacted in the light of the construction given it by the courts of the state from which the statute was taken.[41]

The defendants then set forth the Illinois interpretation:

> The Illinois courts before and since 1955 have construed their statute to mean that unless a criminal offense has actually been committed or attempted, the arrest is unlawful no matter if the officers acted under reasonable belief and in good faith. The language of both the Colorado and Illinois statutes is specified, 'when a criminal offense has, *in fact* been committed . . . .'[42] (Emphasis added.)

The defendants cited numerous cases proving the Illinois interpretation.[43]

Counsel for the arresting officers, interestingly enough, made no attempt to dispute defendants' use of the Illinois case law as authority for interpreting the Colorado statute.[44] However, the officers' counsel cited, in addition to Colorado Revised Statutes, section 39-2-20 (1963), section 211.1 of the Revised Municipal Code of the City and County of Denver which is directly contrary to the statute in that it allows an officer to "arrest any person found under circumstances which would warrant a reasonable man in believing that such person had committed or is about to commit a crime."[45] The plaintiffs, for good reason, never directly argued that

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[40] *Id.* at 43.

[41] *Id.* at 35.

[42] *Id.* at 36.

[43] *Id.* at 37. The defendants stated:

> In a recent case, *McKendree v. Christy* . . . in applying the rule set forth in early cases, the court stated . . . 'These cases interpreting this section [Sec. 657] are clear in holding that where an officer makes an arrest without a warrant for an alleged crime which has not been committed in his presence, such arrest is illegal if the crime has not actually been committed . . . in such case the absence of malice or the presence of probable cause constitutes no defense. 19 J.L.P. False Imprisonment, Pav. 5; Levin v. Costello, 214 Ill. App. 505; Wood v. Olson, 117 Ill. App. 128; Markey v. Griffin, 109 Ill. App. 212.'

[44] Brief for Appellee, p. 33, Boyer v. Elkins, 154 Colo. 294, 390 P.2d 460 (1964) [hereinafter cited as *Brief for Appellee*].

[45] *Id.* at 34.

the municipal ordinance should prevail over the state statute, but the implication is clearly there.[46]

The mention of the city ordinance was somewhat surprising, since the landmark case of *Canon City v. Merris*[47] established that in an area of statewide as well as local concern, the state statute prevails over a corresponding municipal ordinance even though the offense was committed within the municipality. *Merris* held that drunken driving was a matter of statewide concern; certainly the right to arrest without a warrant is on an equal par.

After this nuance, the officers' counsel turned to a definition of "reasonable cause," the second necessary element in an arrest without a warrant. As the statute plainly states, not only must the offense have in fact been committed, but the officer must also have reasonable grounds for believing that the person arrested is the guilty party. Due to the lack of Colorado cases in this area, the plaintiffs were forced to rely on out-of-state cases.[48] It should be noted that the word "reasonable" is subject to varying definitions.[49]

The plaintiffs also raised the definitional specter of another important word — "presence." This definition can vary — from what an officer actually sees, to knowledge afforded him by any of his senses.[50]

Finally, the plaintiffs said, in effect, that if any doubts remain, the officers were justified in making the arrests because the defendants committed actual offenses *after* the arrival of the officers and in their presence.[51] Thus, the plaintiffs afforded the court an opportunity to avoid determining whether the statute only validates an arrest when an out-of-presence offense has *in fact* been committed — all the court had to say was that, in this case, offenses were *in fact* committed.

The Colorado Supreme Court, instead of availing itself of the opportunity to interpret the statute and thus clarify the officers' right to arrest without a warrant, chose — perhaps with good reason — to avoid the major issues.

While quoting both the contradictory laws, the court did not indicate whether it relied upon the Colorado statute or upon the Denver Municipal Code.[52] As previously mentioned, Denver, unlike Colorado, allows the arrest solely on the ground of probable

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[46] *Ibid.*

[47] 137 Colo. 169, 182, 323 P.2d 614, 621 (1958).

[48] *Brief for Appellee,* p. 38.

[49] 36 WORDS AND PHRASES 448 (1962).

[50] LA FAVE, ARREST 236 (1965).

[51] *Brief for Appellee,* p. 72.

[52] 154 Colo. at 300, 390 P.2d at 463.

cause regardless of whether an offense has in fact been committed. The court also refrained from defining either probable cause or presence. In addition, the court failed to mention whether or not Illinois case law is governing in interpreting this statute. As previously shown, the question is of extreme importance in the area of citizen's as well as police arrest without a warrant.

Ultimately, the court, by holding that an offense was *in fact* committed, was able to avoid deciding whether probable cause as to the crime's commission would have been sufficient to justify the arrest.

The only progress made by *Boyer* was in solidifying the previously known rules that a criminal offense committed outside the presence of an officer includes a misdemeanor or violation of a city ordinance as well as a felony and, as to the person, the officer need only have reasonable grounds for believing that the person arrested was the guilty party.[53]

It is interesting to speculate concerning the reasons for the court's reluctance to decide the major problems. It is submitted that the evidence was so strongly weighted toward adopting the Illinois interpretation, and thus the "in fact" requirement, that it would have been very difficult for the court to have adopted any other interpretation. Realizing this, and not wishing to so drastically burden the arresting officer, the court may have decided to ignore the problem in the hope that realistic legislative change would be forthcoming, as recently happened when the same statute was repealed in Illinois.[54] It seems fair to conclude that the criticisms leveled at the Colorado statute[55] are not eliminated by *Boyer.*

In 1964, the hoped-for change was partially realized by a statute applicable only to county courts:[56]

> A summons and complaint may be issued by any peace officer for an offense constituting a misdemeanor which was committed in his presence or, *if not committed in his presence, concerning which he has reasonable grounds for believing was committed in fact* and was committed by the person charged.[57] (Emphasis added.)

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[53] *Id.* at 301, 390 P.2d at 462.

[54] Smith-Hurd ILL. STAT. ANN. ch. 38, § 107-2 (c) (1964): "A peace officer may arrest a person when: He has reasonable grounds to believe that the person is committing or has committed an offense." The Committee Comments following this revision are illuminating: "[S]ubsection (c) adopts the federal rule, and that of many other jurisdictions, that an arrest without a warrant may be made on reasonable grounds that the person has committed or is committing an offense, and not on the basis that 'an offense has in fact been committed,' which is almost impossible for an officer to determine. . . ."

[55] Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices,* 34 ROCKY MT. L. REV. 150, 157 (1962).

[56] Colo. Sess. Laws 1964, ch. 45, § 55, at 429.

[57] Colo. Sess. Laws 1964, ch. 45, § 59, at 430.

Realizing that a summons *per se* is not considered an arrest,[58] the officer is placed in the anomolous position of being absolved from liability if he is reasonably wrong regarding the commission of the misdemeanor if he merely issues a summons, but is liable for this reasonable mistake if he arrests for the same offense. There is also a distinct possibility that stopping and detaining a person for the purpose of writing and issuing a summons constitutes an arrest.

The 1965 case of *Gonzales v. People*,[59] is helpful in defining probable cause. The court, after determining that probable cause and reasonable grounds are substantially equivalent in meaning, set forth a realistic and workable definition when it said: "In dealing with probable cause, one deals with probabilities. 'These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' "[60]

However, the "reasonable cause" language relating to the *commission of the crime* creates a pitfall for the unwary in both the language in the case[61] and the headnotes on arrest.[62] Taken together, they seem to indicate that an officer is justified in making an arrest when he has reasonable grounds for believing that a crime has been committed (assuming he also has reasonable grounds for believing that the person arrested was the guilty party). A close analysis of *Gonzales* and three subsequent cases[63] indicates that probable cause, as to both the crime and the person arrested, is only considered *after* it has been established that a crime was in fact committed.

The *Gonzales* case involved an arrest without a warrant followed by a search for and seizure of narcotics on the person of the defendant. In appealing the conviction, defense counsel argued that the officers did not have probable cause for believing that a crime had been committed and therefore the arrest and the ensuing search and seizure were illegal.[64] The officers' reasonable grounds for believing that the defendant was the guilty party and the fact that the crime was actually committed were not disputed.

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[58] Colo. Sess. Laws 1964, ch. 45, § 67, at 432; Hart v. Herzig, 131 Colo. 458, 464, 283 P.2d 177, 180 (1955).

[59] 398 P.2d 236 (Colo. 1965).

[60] *Id.* at 239.

[61] *Id.* at 238. "Probable cause exists where the facts and circumstances within the officers' knowledge . . . are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

[62] *Id.* at 236.

[63] Lavato v. People, 411 P.2d 328 (Colo. 1966); Gallegos v. People, 401 P.2d 613 (Colo. 1965); Wilson v. People, 398 P.2d 35 (Colo. 1965).

[64] 398 P.2d at 238.

The supreme court held that the arrest was valid because the officers had reasonable grounds for believing that a crime had been committed.[65] By implication, however, the court was actually holding that probable cause as to the commission of the crime is only considered *after it has been established that a crime was in fact committed.* In other words, the in fact commission is still a condition precedent to lawful arrest without a warrant.

Wilson v. People,[66] decided on the same day, illustrates this principle. In this case, although the actual commission of the crime was established, the court held that the arrest was illegal because the officers did not have reasonable grounds for believing that a crime had been committed.

Later cases of *Gallegos v. People*[67] and *Lavato v. People*[68] had essentially the same fact patterns and demonstrated the same principle. In both cases a crime had actually been committed and the court was primarily concerned with determining whether the officers had probable cause for believing that a crime had been committed.

The thread running through all four of the preceding cases is apparent: The actual commission of a crime had been established and the court was only concerned with analyzing the *additional* requirements necessary for a valid arrest without a warrant.

III. Present State of the Law

Summarizing the present state of Colorado law relating to an officer's right to arrest without a warrant, we find that:

1. An officer's common law right to arrest only for a felony or breach of peace committed in his presence or a felony committed out of his presence has definitely been extended to all other types of offenses — misdemeanors, breaches of the peace and violations of city ordinances — whether they were committed in or out of his presence. This is a major advance as the distinction between felonies and misdemeanors is often technical and artificial.[69] Today the officer is no longer handicapped by having to categorize a crime before deciding whether or not he has the right to make an arrest.
2. Regardless of the type of offense, the officer need only

[65] *Id.* at 239.

[66] 398 P.2d 35 (Colo. 1965).

[67] 401 P.2d 613 (Colo. 1965).

[68] 411 P.2d 328 (Colo. 1966).

[69] Prosser, Torts § 26, at 134 (3d ed. 1964).

have reasonable grounds for believing the person arrested committed either the "in" or "out-of-presence" offense.

3. As to the offense itself, it is not absolutely clear whether reasonable cause precludes liability for arresting for an out-of-presence offense or if it must in fact have been committed. A literal reading of the statute, the adoption of the Illinois wording, plus the supreme court's reluctance to come to grips with the problem indicate the latter. If this is true, the officer's common law right to arrest for a felony based on mere reasonable cause has been drastically restricted. This restriction would be a major and unfortunate abrogation of common law rights and will needlessly handicap an officer; he would probably be overly hesitant in arresting for an offense committed out of his presence.
4. Also, if an offense must in fact have been committed to validate an out-of-presence arrest without a warrant, the wording of the statute indicates that this same standard extends to in-presence offenses as well. Again, with respect to a felony, this would be a drastic and unnecessary curtailment of an officer's common law right. However, the possibility of a variable standard should not be overlooked. Reasonable cause as to the commission of an in-presence offense might validate the arrest while for an out-of-presence offense in fact commission would be necessary.

From the preceding, it is obvious that clarification is necessary. Realizing that realistic change must enable the police officer to effectively fulfill his duties, and at the same time afford protection to the individual, one major change should be made: The requirement of an "in fact" commission of an offense should be abolished and the officer should have the right to arrest when he has reasonable cause for believing that any type of offense has been committed. This standard should apply whether or not the crime was committed in or out of the officer's presence.

The present state of confusion must be rectified as soon as possible. Since the courts seem demonstrably loathe to clarify the situation, legislative action is imperative.

Chet Walter