Reasonable Cause in Warrantless Arrests: An Analysis of Some Selected Factors

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Charles L. Cantrell*

INTRODUCTION

The requirement of "reasonable cause" in the law of arrest may well be one of the most troublesome and ambiguous areas in criminal justice. The usual common law requirement states that a warrantless felony arrest is proper if the police officer has reasonable grounds to believe that a felony has been committed and that the person to be arrested participated in the felony.¹

That rule is deceptively simple to remember, but sets forth no objectively understandable premise. The requirement is left without any ascertainable guidelines or standards to use in different factual situations. This deliberate ambiguity probably results from a conscious choice to leave these issues to the police and the lower reviewing courts.²

Because no objective standards were set by the courts, both the police and lower reviewing courts have established certain standard acts that could usually be relied upon to provide reasonable cause to arrest. In many cases courts merely cite one or more of these acts in a manner that would automatically establish reasonable cause. Too little analysis is given to disclose possible innocent interpretations of these acts or gestures.

This article will survey four of these acts or foundations of reasonable cause—physical appearance, furtive gestures, evasive state-

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² For excellent background materials on the law of arrest, see Hall, Legal and Social Aspects of Arrest Without a Warrant, 49 Harv. L. Rev. 566 (1936); Perkins, The Law of Arrest, 25 Iowa L. Rev. 201 (1940); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541 (1924).
ments and flight of the accused. The survey includes analyses of some of the important cases in these areas, and identification of trends and problems.

Physical Appearance

The defendant’s physical appearance has been used by various courts in two distinct methods to satisfy the quantum of evidence required for “reasonable cause.” The first method is employed when the suspect’s appearance fits a description previously known to the police officer. The second method applies when the physical appearance of the suspect indicates that his actions have a strong likelihood of being criminal activity.

In cases concerning descriptions of particular individuals, a court will initially determine the sufficiency of the description. If the description is so vague that many individuals could reasonably be included in it, the description will be deemed insufficient under the Fourth Amendment because it fails to narrow the number of suspects to a tolerable level. That “tolerable” level has never been satisfactorily identified, but it is undoubtedly true that some multiple arrests will be valid if there exists a reasonable belief that the offender is within a reasonably small group.

Another situation does not require judicial screening or narrowing the group to a tolerable numerical level. Instead of a description of a particular suspect, a profile or stereotype is used. These types of profiles are commonly used by officials in airports to identify passengers who could be considered dangerous. Since this description is usually comprised of many elements employed uniformly in

3. United States v. Short, 570 F.2d 1051 (D.C. Cir. 1978). A description of a burglary suspect was held to be insufficient even though it depicted him as a Negro male approximately 18 to 19 years old, five feet nine to five feet ten inches tall, 145 to 155 pounds, with a short Afro-bush haircut and dark complexion. He was further described as wearing a camel-colored, waist-length leather jacket and blue trousers. The court found that the description was insufficient because a number of suspects had been picked up on the same basis. A further element considered was that the police were confused over the precise meaning of “camel-colored.”

4. Professor Perkins found that reasonable cause to arrest exists if there are: grounds sufficient to induce a reasonably prudent man to believe the arrestee guilty of the crime for which the arrest is made or to cause him to believe there is likelihood of such guilt. The latter qualification is sufficient to permit an officer to arrest two persons, for example, if he has reason to believe a felony has been committed by one or the other.

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screening all passengers, reasonable cause is rarely based solely on these identifying criteria.

That type of observation should probably be considered a reasonable investigative technique for allowing security officials to detain only temporarily those persons who fit one or more characteristics of the profile. As such, the absence of a particularized description usually limits the detention to one that would be characterized as an investigatory stop based on reasonable suspicion.5

The second method that courts employ in analyzing the suspect's physical appearance utilizes a "nexus" approach. The nexus exists if the physical appearance of the suspect demonstrates a likelihood that he has participated in criminal activity.

The necessary link may be found by comparing the suspect's appearance to the characteristics of the geographical terrain. For example, reasonable cause to arrest has been based on the fact that two men had snow on their boots when a prior police radio dispatch had reported that two suspects had been seen running by a snow-covered river in the area.6 Despite the fact that one suspect gave a patently false answer to the police regarding his earlier presence in a snow-free area of town, the court based its reasonable cause finding on the fact that the boots were covered with snow.7

Courts will rarely base a finding of reasonable cause solely on a physical appearance having a connection to a specific locale, but a few cases have justified arrests using this method. In one case, reasonable cause was held to exist where an armed robber was chased into wet underbrush one day, and a "stranger" in a small town bought a change of clothes to replace his wet and muddy apparel the next day.8 Another case based on similar reasoning reached an even


The investigatory stop of an illegal alien was upheld where an official identified the suspect as being of Hispanic origin and dressing in a manner similar to other illegal aliens he had arrested on the same flight in the prior year. The court appropriately pointed out that the unique dress of the suspect was only one relevant factor in sustaining the stop and subsequent arrest. United States v. Lopez-Barajas, 412 F. Supp. 1007, 1011 (E.D. N.Y. 1976).


7. Id. at 725, 242 N.W.2d at 192.

8. Lovell v. Henderson, 386 F.2d 257 (6th Cir. 1967). See also LaFeve v. People, 177 Colo. 67, 492 P.2d 852 (1972), wherein the defendant had a white substance in his hair and on his clothes comparable to the drugstore's acoustical ceiling tiles through which burglars had cut. His appearance, taken with the presence of various pill bottles and tools strewn about the car's interior, constituted reasonable cause.
more questionable result;\textsuperscript{9} reasonable cause was found where a burglarly suspect was tricked into getting out of his car, thus allowing a police officer to observe that he was not wearing shoes, and that his socks and the knees of his trousers were wet. The court dutifully listed other factors contributing to the finding, but they were uniformly of an innocent nature.\textsuperscript{10}

A nexus may also be established when the suspect’s appearance gives the police officer reasonable cause to believe that he has engaged in a specific and identifiable criminal act. Perhaps the most famous cases are those dealing with needle marks on a suspect’s arms. Case law has consistently held that needle marks alone are insufficient to justify warrantless arrests for narcotics violations.\textsuperscript{11} Other relevant factors must also be present to justify an arrest for being under the influence of narcotics; these may include the officer’s prior experience with the defendant,\textsuperscript{12} the defendant’s consorting with known addicts,\textsuperscript{13} or certain furtive gestures.\textsuperscript{14}

The majority of cases where physical appearance is relevant to reasonable cause deal with offenses that include an altered physical condition as an element of the crime. The officer usually observes the suspect’s appearance after a temporary detention. Two such crimes, for example, are the offenses of drunken driving and public intoxication. Reasonable cause is easily established in those cases when the officer observes the suspect’s condition or appearance at close range.\textsuperscript{15}

\textsuperscript{10} Id. The court found that the radio description of a “Negro male” justified the stop of defendant’s moving automobile about two-and-a-half blocks from the scene. Other criteria which bolstered a finding of probable cause to arrest were the presence of a “portable” television on the floor in the front of the car, his proximity to a burglary site, evasive responses to police questions and the defendant’s inability to explain why his driver’s license was a duplicate.
\textsuperscript{11} People v. Herrera, 221 Cal. App. 2d 8, 34 Cal. Rptr. 305 (1963). A similar result was reached in a case when an officer noticed a suspect experiencing symptoms of opiate withdrawal. The court found that reasonable cause was not established for an arrest for “use” of a narcotic or being “under the influence” of one. Basing its opinion on both logic and public policy grounds, the court held that an officer’s observations of the defendant’s arms should have been suppressed because the arrest was illegal. People v. Gutierrez, 72 Cal. App. 3d 397, 140 Cal. Rptr. 122, 124 (1977).
\textsuperscript{12} People v. Rios, 46 Cal. 2d 297, 294 P.2d 39 (1956); Avalos v. People, 179 Colo. 88, 498 P.2d 1141 (1972).
\textsuperscript{14} People v. Russell, 196 Cal. App. 2d 58, 16 Cal. Rptr. 228 (1961).
\textsuperscript{15} Possession of certain prohibited articles is not included in this discussion. Some articles, if visible, could certainly be considered part of the suspect’s physical appearance. Discussion was omitted because in most circumstances, the observation of the prohibited article would immediately justify a warrantless arrest. E.g., United States v. Clay, 495 F.2d 700 (7th
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The final category is the most difficult utilized under the nexus approach. It encompasses situations where the suspect's appearance instills a reasonable belief in the police officer that the suspect has engaged in some unidentified criminal enterprise. Unlike those appearances that indicate their own specific criminal activities, these appearances only create a strong suspicion of general criminality in the police officer's mind.

Since the police officer does not know what crime has been committed, he cannot base an arrest on the suspicious nature of the suspect's appearance. These arrests have been uniformly condemned as violations of the prohibition against "status" arrests.16 The most recent cases in this area have centered on mass arrests of "hippies" in parks. While many courts have taken the opportunity to declare the various vagrancy laws unconstitutional, most have also stressed the fact that an unkempt and shabby appearance does not qualify as reasonable cause.17

Some situations arise in this area where the defendant's appearance seems to indicate that a violent struggle has just occurred. Bloodstains and torn clothing could indicate to the police officer that a serious crime has recently transpired. Under these circumstances, reasonable cause to arrest still does not exist unless other important elements can be utilized to form a nexus to a specific crime. In cases of this nature, courts justify a temporary detention of the suspect during an investigation, which may continue as long as reasonable grounds exist to continue it. In determining this question all of the circumstances, including the reasonable police procedure, will be taken into account.18 Therefore, many arrests may ultimately be justified by extending the custodial detention until enough evidence is gathered to warrant a full arrest.19

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18. State v. Isham, 70 Wis. 2d 718, 235 N.W.2d 506, 512 (1975); State v. Williamson, 58 Wis. 2d 514, 520, 206 N.W.2d 613, 616 (1973); State v. Chambers, 55 Wis. 2d 289, 297, 198 N.W.2d 377, 380 (1972).
19. Occasionally a sufficient quantum of facts may be known to the police beforehand or may be obtained through observation of the suspect to warrant a finding of reasonable cause. For instance, when the defendant was seen walking quickly from an alley to his car in an area
**Furtive Acts**

A suspect’s furtive acts are secretive or clandestine. They may be taken into account by the police officer either when the acts are done as a reaction by the suspect upon sighting him, or when they are observed without the suspect’s knowledge.\(^{20}\) Reasonable cause cannot be based solely on furtive actions,\(^ {21}\) but many courts require only a token amount of evidence of other facts to find that an arrest was legal.\(^ {22}\)

The use of furtive actions in determining reasonable cause to arrest is generally based on the theory that a suspect has a “natural impulse” to immediately hide any contraband when he is confronted by law enforcement officials.\(^ {23}\) Given this “natural impulse,” the police officer may reasonably infer from the timing and direction of the movements that the suspect is engaged in criminal activity.

A typical case is where the officer’s attention has been directed to the suspect beforehand and a furtive act occurs when the party recognizes the officer. For example, when an officer was tipped by a bank teller to observe a person suspected of passing a forged check, reasonable cause was easily established when the suspect, seeing the officer, abandoned his business with the teller and quickly walked away.\(^ {24}\)

An atypical case occurs where the officer’s attention is not initially directed toward the suspect, but becomes so when he commits

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\(^{20}\) While a furtive act may be more suspicious when it can be shown that it was a reaction to the presence of police, both categories of furtive acts may support a finding of probable cause. When an undercover officer was assigned to determine if a certain employee was accepting bets, the employee’s consistent series of furtive acts in making phone calls while reading a newspaper and accepting money with slips of paper established reasonable cause to arrest. The employee never had knowledge of the officer’s identity or presence, but the court weighed the entire series of otherwise innocent acts in making the determination. *State v. Mogulnicki*, 6 Conn. Cir. Ct. 228, 270 A.2d 96 (1970), *cert. denied* 400 U.S. 826 (1970).

\(^{21}\) “Deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.” *Sibron v. New York*, 392 U.S. 40, 66-67 (1968).

\(^{22}\) *See generally* cases cited at notes 35-38, *infra*.


\(^{24}\) *State v. Gilmore*, 323 So. 2d 459 (La. 1975); *see also* *People v. Hall*, 40 Mich. App. 329, 198 N.W.2d 762 (1972).
a furtive act. In one such case reasonable cause was found when officers entered a bar and ordered everyone to "freeze" and move to the wall. The court held that the police could search an eyeglass case dropped by the suspect during the search of the bar.25 In these cases courts appear to stretch the inherent "suspiciousness" of a furtive act to an extreme. At least one court has indicated a preference for justifying the search, and then justifying the subsequent arrest on the fruits of the search.26 Using the fruits of a search to justify a later arrest can be constitutionally sound only if there existed probable cause to search for the article or if the frisk was privileged because the officer had reasonable fear for his safety.27

In too many cases courts do not analyze the initial intrusion or search, but merely refer to the furtive gesture as sufficient justification. Apparently, the "natural impulse" is considered an element quantitatively more important for probable cause to search than for reasonable cause to arrest.28

Regardless of the fact that some courts place too heavy an emphasis on furtive gestures, all courts strive to cite other factors that, combined with the furtive act, will constitute reasonable cause. Essentially there are two methods: (1) prior information known to the officer and (2) observations made by him.

If the officer has prior information regarding some criminal activity of the suspect, the furtive gesture looks even more suspicious than usual. This probably constitutes the strongest incriminating posture of the furtive gesture. The analysis under the theory that when prior information is supplemented by direct police observation, the information gains credibility. That confirmation need not be so extensive as to require observation of predicted events.29 Rather, the confirmation is sometimes so skimpy as to be nothing more than observing the furtive act.30

That type of observation should have little merit; there is no confirmation of facts, rather only an observation of a furtive act. The act carries with it the explanation that it is the "natural impulse" of the guilty mind. Combining the prior information, furtive act,

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and presumption of hiding contraband, a finding of reasonable cause usually ensues.

One recent case regarded a furtive act as a complete substitute for an informant's omitted underlying basis of information. The court freely admitted that a certain tip did not meet the two-pronged test of *Aguilar v. Texas.* However, the court said that the description of the suspect was detailed, and when the officers observed the suspect, they "verified" the details. Therefore, a mere suspicion which is obviously insufficient to establish reasonable cause may, nevertheless, combine with a furtive act to justify a warrantless arrest based on reasonable cause.

The second category of extraneous factors which supplement the furtive act is direct police observation. If the police officer observes an article and recognizes it as contraband, reasonable cause will exist at the moment of recognition. In situations where the article secreted appears to be contraband, but an extended investigation is necessary to determine whether or not it is, reasonable cause still exists.

The police may also observe certain acts of the suspect that are clearly suspicious but are not connected to a particular crime. In many cases the police will initiate a confrontation with the suspect on some independent grounds. For example, reasonable cause was found to exist where police were investigating an illegally parked car near a phone booth, and the defendant reached into his sock, and extracted and attempted to eat a homemade cigarette.

In these cases, attention may be directed to the suspect through conduct which may not constitute a traffic offense or misdemeanor. Indeed, the conduct found to be suspicious may be perfectly legal. Even in these cases where the officer's suspicion is at its lowest level,

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32. 378 U.S. 108 (1964). This case required the magistrate to be informed of some of the circumstances on which the informant based his conclusion and some of the circumstances from which the officer concluded that the informant was reliable.
33. The court probably misapplied the Draper verification method. In the Draper case, the description was of a man arriving on a certain train, at a certain time, dressed in a certain way and carrying a tan bag. Draper v. United States, 358 U.S. 307, 309 (1959). In the present case, the suspect was a bartender on duty. The bar was open to the public, and any number of people could have described the bartender. At best, the verification only helped the informant's credibility, and could not prove his assertion that the suspect was selling heroin. In this regard, see Justice White's opinion in *Spinelli v. United States*, 393 U.S. 410, 426-29 (1969).
reasonable cause is regularly found to be present.\textsuperscript{36}

The greatest number of cases arising in this area occur when a furtive gesture is made during or after a routine traffic stop. The California courts have employed a variety of different factors in supplementing the furtive act in traffic stops. Some of those additional considerations include the driver’s failure to stop the car promptly,\textsuperscript{37} the remoteness of the area,\textsuperscript{38} the erratic or dangerous driving of the suspect,\textsuperscript{39} and the incidence of violence in the neighborhood.\textsuperscript{40}

The traffic cases illustrate the major problem in this area. Courts traditionally find that a furtive gesture in a traffic case justifies a search of the area where the person could reach in the car.\textsuperscript{41} The difficulty is only increased when the police know that their reports can be written to include a furtive act and thus gain acceptance from the court.\textsuperscript{42}

It remains arguable whether the “natural impulse” presumption should persist in traffic cases. Recent decisions have alluded to the necessity of preventing attacks on police officers.\textsuperscript{43} The rationale of the officer’s self-protection is more realistic than presuming that contraband is being hidden,\textsuperscript{44} but either rule carries a potentially high probability of abuse.

A better approach would be to recognize that a simple movement by a traffic offender does not carry a “natural impulse” presumption. There is simply no rational inference that the suspect is doing something illegal when the possibilities and probabilities of innocent gestures far outnumber suspicious ones. In addition to the irrational inference, the possibility of police error can be great. The officer’s view from a moving vehicle can be restricted; at night there

\textsuperscript{36} When police confronted five suspects in an alley, reasonable cause was found to exist at the moment when a matchbox and billfold were dropped to the ground. Jones v. State, 493 S.W.2d 933, 935 (Tex. Crim. App. 1973).

\textsuperscript{37} People v. Gil, 248 Cal. App. 2d 189, 56 Cal. Rptr. 88 (1967).


\textsuperscript{40} People v. Cantley, 163 Cal. App. 2d 762, 329 P.2d 993 (1958).


\textsuperscript{42} Id., p.1534, note 95.

\textsuperscript{43} Adams v. Williams, 407 U.S. 143, 146 (1972); Terry v. Ohio, 392 U.S. 1, 10 (1968).

\textsuperscript{44} Several innocent gestures can have a furtive interpretation, e.g., People v. Goodrick, 11 Cal. App. 3d 216, 219, 89 Cal. Rptr. 866, 869 (1970) (turning off the radio); People v. Shapiro, 213 Cal. App. 2d 618, 620, 28 Cal. Rptr. 907, 909 (1963) (putting out cigarette). The list is seemingly endless, including removing articles from the lap, unfastening seatbelts, engaging parking brake, and reaching for purses or wallets.
may be no real view at all.\footnote{People v. Superior Court, 91 Cal. Rptr. 729, 741, 478 P.2d 449, 459 (1970); People v. Cruz, 264 Cal. App. 2d 437, 441, 70 Cal. Rptr. 249, 251 (1968); People v. Moray, 222 Cal. App. 2d 743, 746, 35 Cal. Rptr. 432, 434 (1963).}

It is important to emphasize that the initial intrusion or stop of the suspect must be proper. Since investigatory stops can be based on a mere reasonable suspicion, there are relatively few instances where a legal issue arises as to the justification of the stop. However, when other intrusions require a greater degree of fourth amendment scrutiny, unprivileged police conduct can sometimes be responsible for the furtive act. If the unprivileged police activity is responsible for the furtive act, the act will be considered involuntary. Such an involuntary act cannot be used in determining reasonable cause.\footnote{Hobson v. United States, 226 F.2d 890 (8th Cir. 1955). When officers should have obtained a search warrant beforehand, the suspect's throwing a package of heroin out of his window into the backyard could not be considered a factor in establishing reasonable cause.

One should note the difference between illegal police activity and ineffective police activity. Thus, when police unsuccessfully attempted to arrest the defendant, his act of throwing down a brown package could be considered in making the arrest at a later time. People v. Jackson, 98 Ill. App. 238, 240 N.E.2d 421 (1968).}

\textit{Conflicting and Evasive Statements}

This section deals with statements by a suspect, usually to a police officer, that would not qualify as confessions or admissions. These utterances can range from obvious falsehoods to refusals to explain certain actions. Regardless of the different types of responses or refusals, the vast majority of courts maintain that when a suspect makes such a statement, he is not co-operating with the police. Such non-co-operation is viewed as a suspicious factor and may be used in formulating reasonable cause to arrest.

One category of cases involves conflicting statements made by one or more suspects. This presupposes an interrogation of sufficient duration to elicit more than one statement or explanation. Generally speaking, contradictory statements alone are insufficient to satisfy the reasonable cause requirement. Therefore, when two suspects gave conflicting stories in response to police questioning, reasonable cause was not present when the only other factor was their presence in a high crime area.\footnote{Jones v. Peyton, 411 F.2d 857 (4th Cir. 1969), cert. denied, 396 U.S. 942 (1969). The suspects were arrested for being "night prowlers," but established case law construed that offense to cover one who has a "habit" of moving at night for the purpose of committing a crime. \textit{Id.} at 861. \textit{See also} Fedele v. Commonwealth, 205 Va. 551, 138 S.E.2d 256 (1964).}
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However, when possible contraband is either in the possession of the suspect, or so near as to indicate some connection with the suspect, courts have found that contradictory or conflicting stories are especially incriminating. Although other factors are routinely mentioned, it appears that the statements are the most important elements considered. For instance, when several stripped cars were found in an area adjacent to the defendant's property, his conflicting stories and nervous condition justified a warrantless arrest. 48

When the defendant continually changes his story and contradicts himself, the suspicion becomes greater. This approach certainly appears to be reasonable. It also has the added effect of requiring less reliance on factors other than the defendant's contradictory statements. Thus, when a defendant changed his story many times while attempting to explain his presence at the scene of an arson, the court found that reasonable cause to arrest existed because of his contradictory stories. 49

In some cases the conflicting statements of one suspect may be used in justifying an arrest of another. When the circumstances indicate that they are acting in concert in an apparent illegal activity, the contradictory statements of one may be used to establish reasonable cause for arrest of the other. 50 If one suspect's statement is not contradictory, however, and there is no implication of another person in any manner, reasonable cause is not established. In the landmark case of United States v. DiRe, 51 a government informer clearly implicated only one of two persons in the car in which he was seated. The arrest of the person who was not implicated was held to be without reasonable cause since the statement of the informer could not be construed as casting suspicion on him, and the suspicion resulting from his presence in the car quickly diminished when he was not pointed out by the agent. 52

Another category of statements is where the suspect's response is termed "unsatisfactory" by the police officer. This type of approach focuses on the subjective satisfaction of the police officer. In essence, it is little more than the officer's disbelief of the defendant's

48. United States v. Brown, 457 F.2d 731 (1st Cir. 1972), cert. denied, 409 U.S. 843 (1972). See State v. Stafford, 6 Conn. Cir. Ct. 613, 281 A.2d 827 (1971). In that case an arrest was justified when a police officer heard conflicting stories from some boys who had six cases of soda in a car's backseat, and their car had come from the general direction of a bottling plant.
52. Id. at 594.
statement. If the suspect's answer does not sound truthful, and there are other factors present, reasonable cause to arrest can be established.

Some jurisdictions give extraordinary weight to unsatisfactory explanations. Thus, when a person was found walking late at night in a high crime area, his inability to satisfy an officer's questions established reasonable cause to arrest.53

In most instances reasonable cause should not exist where the suspect is merely present in a high crime area and is unable to answer an officer's questions satisfactorily. Absent extraneous factors, the mere presence of the suspect in a high crime area will justify neither an arrest54 nor an investigatory stop.55 Therefore, if the statements are correctly viewed as a product of the illegal stop or seizure, they should not be used to justify that which could not be accomplished in the first place—an arrest.56

Another troubling aspect of these “unsatisfactory” statements is that they often are made in response to unreasonable questions. There is simply no guideline or rule concerning what may be asked someone who is temporarily stopped. There are two reasons. The first is that an officer must be given a wide latitude in forming his questions. Undoubtedly his judgment at the scene can take into account many factors that a reviewing court cannot. For instance, the suspect's clarity, nervousness, delay, and facial expressions can be observed during the questioning. The second reason for not formulating rules for this type of questioning is that the traditional approach of courts has been to analyze the “temporary” restraint only in terms of the reasonableness of time detained. Only if a person has been restrained for an unreasonable length of time will the fourth amendment sanctions be applied.


55. Since there is no presumption that persons found in high crime districts probably commit crimes, one's mere presence there is as consistent with innocent activity as with criminal activity. Assuming the above to be true, a stop is not justified. People v. Robles, 28 Cal. App. 3d 739, 104 Cal. Rptr. 907 (1972); People v. McLean, 6 Cal. App. 3d 300, 85 Cal. Rptr. 683 (1970).

56. See Jones v. Peyton, 411 F.2d 857 (4th Cir. 1969), cert. denied, 396 U.S. 942 (1969), where the court found that the stop was based on only the “barest unsupported suspicion.” It ultimately held that the defendants' conflicting stories could not satisfy the reasonable cause requirement. Id. at 862.
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Examples of questions asked include a wide range of inquiries. In one case, a defendant in soiled clothes would not tell a police officer what kind of clothes were in a new suitcase he was carrying. The court found that his inability to answer and his prior furtive gestures gave the officer reasonable cause to arrest without a warrant. In another case with similar facts, reasonable cause was found to exist where the police officer did not believe the defendant’s story about forgetting to pack his clothes in his suitcase that was voluntarily opened at the officer’s request. This disbelief, coupled with the defendant’s refusal to cooperate further by disclosing the alleged owner of the bag, constituted reasonable cause.

Perhaps the most unreasonable question asked in recent memory was in Cotton v. United States, when the court thought it was very suspicious that the defendant could not remember where he had obtained a twenty dollar bill. The bill turned out to be counterfeit, but there were other facts present that would have justified a warrantless arrest. Possibly the court was enjoying accurate hindsight, but it is a bit far-fetched to believe that many people can remember the origin of the money they carry. Responses to such unreasonable questions convey no rational inference of suspicion or guilt and should be discounted.

The third category of responses that is utilized to satisfy the requirement of reasonable cause is where the suspect refuses to answer inquiries from the police. If there are other factors that create a reasonable suspicion that the suspect has committed a crime, then the fact that he refuses to answer questions is often regarded as an important factor in establishing reasonable cause to arrest.

In situations where the extraneous factors do not create a reasonable suspicion and consequently do not give a police officer the

58. Id. at 834-35.
60. Id. at 226, 207 N.E.2d at 286.
61. 361 F.2d 673 (8th Cir. 1966).
62. Id. at 675.
63. State v. Turner, 112 Ariz. 350, 541 P.2d 1152 (1975). Reasonable cause was found to exist where the defendant interfered with the questioning of a suspected prostitute. Though the officer was mistaken about the defendant’s identity, the arrest was held valid because of the officer’s recollection of a different, but similar, description of a wanted individual, and because the defendant refused to repeat his name for the officer.

In a similar case, reasonable cause existed where the defendant matched a teletype description, and refused to roll down his car window and talk to a policeman. People v. Webb, 66 Cal. 2d 107, 424 P.2d 342, 56 Cal. Rptr. 902 (1967). See also People v. Tassone, 41 Ill. 2d 7, 241 N.E.2d 419 (1968), cert. denied, 394 U.S. 965 (1969).
right to stop an individual temporarily, the refusal to identify oneself or to answer questions cannot be considered relevant in establishing reasonable cause to arrest. Therefore, if the initial intrusion (stop) is not justified, the police officer cannot ordinarily draw the same suspicious inferences from the suspect’s refusal to cooperate.\footnote{64}

If a suspect responds to an officer’s question by an obvious falsehood, that response is considered very suspicious and heavily incriminating. Both police and courts alike rely upon that sort of response to establish reasonable cause to arrest. If suspicious circumstances exist and the suspect lies about facts which are independently known to the police through observation or prior information, reasonable cause to arrest exists.\footnote{65}

If the suspect’s response is not immediately determined as false, courts customarily extend the detention to allow the police officer to check the suspect’s answer. Lengthening the temporary detention is thought to be constitutionally balanced by the greater accuracy gained about the suspect’s story since it is a reasonable intrusion under the fourth amendment and is an invaluable investigatory tool of law enforcement.\footnote{66}

\textit{Flight}

Mere flight is insufficient to justify a warrantless arrest.\footnote{67} Yet

\footnote{64. The United States Supreme Court has held that the defendant’s refusal to speak to a policeman and his verbal protestations of treatment were protected under the first amendment and did not justify an arrest for disorderly conduct. The only “suspicious” activity of the defendant had been his walking in a high crime area. Norvell v. City of Cincinnati, 414 U.S. 14 (1973).

In a case decided before Terry v. Ohio, supra note 43, a court held there was no reasonable cause to arrest for disorderly conduct where the defendant shouted at officers that he did not have to identify himself. In holding that there was no reasonable suspicion present, the court stated that there was no legal mandate for a citizen to identify himself to police. People v. Tinston, 6 Misc. 2d 485, 163 N.Y.S.2d 554 (1957).

65. Where the defendant denied his true name and his prior whereabouts, and both were known to police, reasonable cause existed. People v. Brady, 16 N.Y.2d 186, 211 N.E.2d 815, 264 N.Y.S.2d 361 (1965). See also State v. Christiana, 249 La. 247, 186 So. 2d 580 (1966), cert. denied, 385 U.S. 835 (1966), where the defendant denied facts which were clearly observable by police officers.


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if there are other incriminating factors present, the defendant’s attempt to flee from a police officer takes on added significance. Flight is then viewed as a strong indicator of guilty knowledge.68 If the identity of the policeman is in doubt, the flight must be regarded as ambiguous and cannot properly reflect the mens rea of the suspect. That proposition remains valid even when the police officer attempts to correct the initial false impression by stating his true identity or purpose.69

The nature of flight is crucial when a reviewing court scrutinizes the reasonable cause determination. Where a defendant merely “quenches his pace” in response to observations by plain-clothes police, his actions are not sufficiently suspicious to warrant an arrest or stop.70 This judicial approach undoubtedly recognizes a potential for police abuse in cases where the suspect is alleged to be fleeing in anything less than a speedy manner.

When officers have knowledge of other incriminating factors, a suspect’s flight may give rise to reasonable cause if the flight is “substantially contemporaneous” with the other elements.71 In most instances the police are directed to a certain area or locale in response to a call or alarm. If an individual is seen fleeing the area, reasonable cause will usually exist for a warrantless arrest. Assuming that the police response was made within a reasonable time or contemporaneously with the alarm, suspicion would naturally point to the fleeing individual. Likewise, the longer the delay in correlating the other known factors to the flight, the less important and reliable the flight becomes.

The requirement that flight be “substantially contemporaneous” with the crime encompasses more than a temporal element. There must also be a sufficient nexus between the suspect’s flight and the commission of a particular crime. In a case where police went to a particular location searching for a described person and a stolen stereo, another individual’s flight from the scene did not justify his warrantless arrest.72 It was later determined that the individual was

68. See Wong Sun v. United States, 371 U.S. 471, 483 (1962); in which the Court held defendant’s flight from police (who knocked at his door at six a.m. and misrepresented themselves as customers of his laundry business, then identified themselves as narcotics agents) did not signify defendant’s guilty knowledge. See also Sibron v. Peters, 392 U.S. 40, 66 (1968).
fleeing because he was carrying illegal drugs. The court found that there was no connection between the true reason for his flight and the police officer's erroneous assumption that flight was an indication of stereo theft. The court stated that flight was "consciousness of wrongdoing," but that this assumption hardly justified the supposition that a warrantless arrest could be made.73

In circumstances where the defendant flees because of his present guilty mind or because of another viable reason, the better view is that the flight may be considered in the reasonable cause determination.74 Such evidence is typically admitted before the jury. If the defendant wishes to explain the flight as being in response to another reason, he may raise it as a defensive matter. In many cases the defendant's alternative interpretation will involve another crime completely extraneous to the charge at hand. Thus, it will do little good to bring explanations of a different mens rea before the jury.75

One particularly troublesome area involves cases in which flight is in response to illegal police activity. When a suspect flees in one of these situations, the flight cannot be used for establishing reasonable cause to arrest.76 It is important to remember that reasonable cause must exist at the time of the suspect's flight and before the police begin their pursuit. The required quantum of evidence must be present at that time because the beginning of the pursuit starts the arrest.77

A majority of jurisdictions recognize the principle that it is lawful for a citizen to resist an illegal arrest nonviolently. This common law rule permits flight from unlawful police activities. The flight is regarded as "tainted" and cannot be used in establishing reasonable cause.78

Two important qualifications exist to the above rule. The first

73. Id. at 421, 182 N.W.2d at 590.
75. Id. at 306, 196 N.E.2d at 265, 246 N.Y.S.2d at 629. In Yazum, the court said the defendant could always tell the jury that he was afraid he was being picked up for parole violation instead of investigation for robbery. The choice was supposedly fair to the defendant because his privilege should be used only as a "shield" instead of a sword to exclude an otherwise admissible interpretation of circumstantial evidence.
78. The rule has been extended to related activities of the fleeing suspect. Therefore, when the defendant violates traffic laws in making good his escape, those violations cannot be considered in establishing the initial reasonable cause to arrest. Pollard v. State, 233 So. 2d 792 (Miss. 1970).
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is the employment of a useful police technique whereby the suspect is asked to consent to a search or is otherwise lawfully and temporarily detained by police. In those circumstances, the initial police intrusion is not illegal. If flight occurs as a result of a permissible questioning or stop, it may be used to establish reasonable cause to arrest.79

The other exception to the “tainted” flight rule exists most notably in the Ninth Circuit. That position states that peaceful resistance to illegal police activities or flight may be used to establish probable cause unless the illegal acts show “bad faith, unreasonable force, or provocative conduct.”80

That minority position attempts to strike a balance between the honest errors of everyday police work and the undesirable result of allowing a criminal to escape prosecution. In fashioning such a standard, the Ninth Circuit requires a high degree of police misconduct or bad faith before the judicial sanction will be invoked to nul-

ify the arrest.

Such a result-oriented test is objectionable on at least two grounds. The first objection is that the court does not place sufficient importance on the fact that an individual has a paramount right to be free from illegal or unlawful governmental interference. The rationale behind judicially-imposed sanctions against police is that they will act as a deterrent to illegal police practices. The exclusion of otherwise trustworthy evidence because of a constitutional violation is thought to reinforce the idea that the individual’s rights are to be held in high regard. The minority rule of the Ninth Circuit is simply inconsistent with the basic precepts of deterrence.

Secondly, such a rule is objectionable because it conveniently ignores the realities of the courtroom. Even the most skilled advocate will find the task of attempting to show “bad faith” on the part of the police officer to be almost impossible. Aside from the real problem of allowing police officers to tailor their testimony to show “good faith,” the vast majority of police acts are not done in bad faith. Such a rule, however, still overlooks the fact that many stops or police acts are illegal and unconstitutional. To say that “good

80. United States v. Garcia, 516 F.2d 318, 320 (9th Cir. 1975); United States v. Moore, 483 F.2d 1361, 1365 (9th Cir. 1973).
faith” violations of the fourth amendment may occur as an everyday matter in police work is to abandon most sanctions for improper police conduct. Moreover, the rule allows reasonable cause to be determined by the subjective motivations of the police, rather than an unbiased assessment of the circumstances and facts of the case.

CONCLUSION

Ideally, reasonable cause for a warrantless arrest should entail a substantial objective basis for the belief that a suspect has committed a crime. This objective basis must be established by a review of the nature of the evidence considered by the police officer in his decision to arrest. If reviewing courts continue merely to recite stock phrases such as “flight” and “furtive gesture,” the development of the law of arrest will proceed at a snail’s pace.

Courts should emphasize at least three different reviewing techniques to test reasonable cause. The first method is to investigate closely the suspicious acts of the defendant in regard to the attenuation of those acts and the probability that a crime has been committed. If no extraneous factors exist contemporaneously with respect to location or time, then reasonable cause will not have been established. Secondly, courts should scrutinize the cause of the suspicious acts of the suspect. If illegal police activity prompts the acts, then they should be considered “tainted” and inappropriate for determining reasonable cause to arrest. To hold otherwise invites police abuse without corresponding judicial sanctions. Finally, courts should analyze the police practice of extending the temporary stop of a suspect until they are “satisfied.” The question remains: satisfied as to what? Unless the police officer has some type of articulable, verifiable suspicion, the suspect should be released. Many police departments have established operating procedures designed to compel the police officer to take immediate steps to check out the suspect’s story so the temporary detention may be ended. However, there exist no fourth amendment constraints upon this police procedure except “unreasonableness.”

These problems will persist as long as courts continue to act as rubber stamps to the police discretion employed in arrests. Police discretion is far too valuable a tool to dispense with entirely. Rather, this discretion works best in our criminal justice system
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where it is consistently reviewed by the appropriate judicial forums. This idea is not novel—it is precisely the manner in which the system was intended to function. When courts truly begin to analyze the factors that usually make up the reasonable cause requirement, a consistent body of case law will develop.