

Misdemeanor Arrest Quirks

As a general rule, officers may arrest a suspect for a misdemeanor if they have probable cause. Nothing more is required. But if the crime was a misdemeanor, there are some actual and plausible issues that may arise.

THE “IN THE PRESENCE” RULE: Officers may not ordinarily arrest someone for a misdemeanor unless they have probable cause to believe that the crime was committed in their “presence.”¹ Unfortunately, the question of what constitutes “presence” seems to be more of a philosophical or existential question than a practical one. In any event, the requirement can be satisfied with circumstantial, as well as direct, evidence.² For example, in *People v. Lee*³ an officer in an apparel store saw Lee carry five items of clothing into a fitting room, but when she left the room, she was carrying only three which she returned to the clothing rack. The officer then checked the fitting room and found one item there, which meant that one was unaccounted for. So, when Lee left the store, the officer arrested her for misdemeanor shoplifting. The missing item was found in Lee’s purse. On appeal, Lee claimed the arrest was unlawful because her concealment of the item did not occur in the officer’s presence. It didn’t matter, said the court, because the term “presence” has “historically been liberally construed, and, thus, “neither physical proximity nor sight is essential. Also note that, there are several exceptions to this rule, most notably arrests for DUI, carrying a loaded firearm, domestic violence, and arrests of minors.⁴

TIME OF ARREST: Unless the arrest occurs in a public place, it must ordinarily be made between the hours of 10 P.M. and 6 A.M. In this context, a place is “public” if it is a location in which the arrestee cannot reasonably expect privacy.² Exceptions: A misdemeanor arrest may be made at any hour of the day or night if the crime was committed in the officer’s presence;³ the suspect was arrested for domestic assault, battery, or for violation of a domestic violence protective or restraining order;⁴ the arrest was made by a citizen,⁵ or the arrestee was already in custody on another matter.⁶

DELAYING AN ARREST: If officers have probable cause to arrest for a misdemeanor (or felony), they are not required to do so as soon as possible. In fact, the

courts recognize there are several legitimate reasons to delay or defer, such as gathering additional evidence.⁵ As the Seventh Circuit said, “Certainly, good police practice often requires postponing an arrest, even after probable cause has been established.”⁶ Similarly, the Eighth Circuit pointed said, “The fact that police may deprive someone of their liberty does not mean that they should.”⁷

“STALE” MISDEMEANORS: Speaking of delaying an arrest, there is an old, old rule that an arrest for a misdemeanor was unlawful if there was a substantial delay between the establishment of probable cause and the arrest itself. Thus, the California Supreme Court observed—in 1907—that “it seems to be generally held that an arrest for a misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the arresting officer.”⁷ This rule was apparently based on the idea that people who committed misdemeanors were less likely to remember what they did than people who commit felonies. Thus, it was unfair to arrest them because they “would not necessarily be familiar with the circumstances justifying the arrest.”⁸ Regardless of whether that ever made sense, the Supreme Court seemingly questioned the idea when it observed, “in earlier times the gulf between the felonies and the minor offenses was broad and deep. Today the distinction is minor and often arbitrary.”⁹ In addition, there are no cases in California (or anywhere else, as far as we know) in which evidence has been suppressed on grounds that the crime under investigation was a stale misdemeanor. Thus, the Supreme Court observed that “statutes in all 50 states permit warrantless misdemeanor arrests in a much wider range of situations—often whenever officers have probable cause for even a very minor criminal offense.”¹⁰

WHEN PROBABLE CAUSE ENDS: Unlike probable cause to search, probable cause to arrest continues indefinitely unless a judge or the arresting officers make a determination that it never existed or that it no longer existed due to new information. As the Supreme Court explained, “Probable cause to arrest, once formed, will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light.”¹¹

¹ See *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 725. ² See *People v. Steinberg* (1957) 148 Cal.App.2d 855. ³ (1984) 157 Cal.App.3d Supp. 9. ⁴ See Pen. Code §§ 243.5, 836, 836.1, 1203.2 258.50(g); Welf. & Inst. Code § 625. ⁵ See *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715, 1727]. ⁶ *U.S. v. Haldorson* (7th Cir. 2019) 941 F.3d 284, 292. ⁷ *U.S. v. Pelletier* (8th Cir. 2012) 700 F.3d 1109, 1117. Also see *U.S. v. Wagner* (7th Cir. 2006) 467 F.3d 1085, 1090. ⁸ *People v. Bloom* (2010) 185 Cal.App.4th 1496, 1502. ⁹ *Tennessee v. Garner* (1985) 471 U.S. 1, 14. ¹⁰ See *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715]. ¹¹ *United States v. Watson* (1976) 423 U.S. 411, 449.