North Carolina Criminal Law

UNC School of Government Blog

Probable Cause: The Same for All Crimes?

June 28th, 2011

By Jeff Welty

Suppose that a magistrate is asked to issue a search warrant for a particular residence. Based on the information presented to her by the applicant, the magistrate believes that there is approximately a 25% chance that a search of the residence will result in the discovery of evidence of the crime under investigation. When deciding whether to issue the warrant, does it matter what the crime is? Should the magistrate interpret probable cause differently when the crime is the kidnapping of a young child than when the crime is the counterfeiting of Gucci purses? The same issue arises for an officer considering whether he has probable cause to arrest a suspect.

There are good arguments on both sides. Requiring a different degree of certainty for different crimes would complicate the magistrate's or officer's job, and there is little agreement on which crimes are most serious, meaning that the probable cause standard would vary from one officer or judicial official to another. On the other hand, the ultimate command of the Fourth Amendment is reasonableness, and it seems reasonable to allow the police more leeway in investigating serious crimes.

The Supreme Court has never answered this question. Some of its decisions arguably support a unitary interpretation of probable cause. *See*, *e.g.*, *Dunaway v. New York*, 442 U.S. 200 (1979) ("The [probable cause] standard applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations."). But others emphasize that the probable cause standard is a compromise between the need to protect individuals' privacy and the need to protect society, *see*, *e.g.*, *Brinegar v. United States*, 338 U.S. 160 (1948), and society needs more protection from serious offenses than from minor ones. (And individuals' privacy needs more protection from greater intrusions than from lesser ones, a point that the Court has recognized in some contexts. *See*, *e.g.*, *Schmerber v. California*, 384 U.S. 757 (1966) (adopting a higher-than-probable-cause standard for searches that require intrusion into the human body).)

There's relatively little case law on point in the lower courts, with the exception of the Seventh Circuit, which has a line of authority endorsing a sliding-scale approach to probable cause. *Pasiewicz v. Lake Co. Forest Preserve Dist.*, 270 F.3d 520 (7th Cir. 2001) (accepting the claim that "officers need a greater quantum of evidence when making arrests for less serious crimes"); *Mason v. Godinez*, 47 F.2d 852 (7th Cir. 1995) (finding an "inverse" relationship between the seriousness of a crime and the amount of proof needed to constitute probable cause); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985) (probable cause is not a "point but a zone"). Professor LaFave's treatise collects a few other cases. Wayne R. LaFave, *Search and Seizure* § 3.2(a) (4th ed. 2004). I'm not aware of any North Carolina cases on this issue.

Finally, the issue has perplexed the commentators, though it appears that a majority believe that the seriousness of the crime under investigation may be considered when assessing probable cause. *See* LaFave, *supra* (discussing both sides of the issue, and collecting cases and authorities, without reaching a firm conclusion); Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 Va. L. Rev. 1957 (2004) (arguing in favor of distinguishing between crimes based on severity, but acknowledging the practical difficulties of this approach); Ronald Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 Miss. L.J. 279 (2004) ("When computing the odds for probable cause, it seems obvious that a low level of probability should suffice when the stakes involve a terrorist threat. Conversely, we would expect that a high level of probability must be satisfied when the stakes are limited to the possible escape of an illegal smoker.").

Returning to the question with which we began, it seems to me that the legal authority weighs slightly in favor of allowing a law enforcement officer or a judicial official to consider the seriousness of the offense when deciding whether probable cause exists. The Supreme Court may choose never to recognize that point, for fear of sowing uncertainty and litigation by fragmenting the probable cause standard, but as an empirical matter, I would be very surprised if officers and judicial officials didn't consider the severity of the crime, at least subconsciously, when making probable cause determinations.

Tags: fourth amendment, probable cause, Search and Seizure, search warrants

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3 Responses to "Probable Cause: The Same for All Crimes?"

1. *David Spence* says:
June 28, 2011 at 8:36 am

The fact that there is only a 25% chance of discovering the "evidence," I would think that "probable cause would never exist here- "probable" has been defined as "more likely than not."
If there was a kidnapped child in a home and the child may be in danger, Mincey v. Arizona, 437 US 385(1978) or State v. Braswell, 312 NC 553 (1985), the officers may be able to enter a home without a warrant when necessary "to save life, to prevent injury or to protect property. Since the standard in these cases is one of "good faith."

Reply

2. *Elliot A. Rushing* says:
June 28, 2011 at 9:15 am

Jeff, when I taught officers regarding probable cause, it was in the context of other standards in a tier, so "reasonable suspicion" is less than "probable cause", probable cause is less than "preponderance of the evidence", which is less than "beyond a reasonable doubt", which is less than the ever popular phrase "beyond a shadow of a doubt". We know from Illinois v Gates ("substantial chance", "fair probability") that the "probable" in probable cause is not synonymous with "probably" or "more likely than not". Even so I found using percentages (here 25%) to be dangerous as a teaching tool, because a firm percentage is not what you're going to encounter in the field. As a practical matter officers (and all of us) should regard probable cause as a solemn, serious standard, and that you want to be as sure as possible under the circumstances you're in before you commit an act that falls under this standard. The crime itself (elements, where evidence is located) will certainly be a part of the holistic analysis, whether for arrest or for a search. The seriousness of the crime tends more to the urgency of the circumstance from the officer's perspective, and societally we want officers to proceed with all due haste, but not undue haste.

Reply

3. *Ron L. Jessup* says:
June 28, 2011 at 2:03 pm

Dear Jeff:

Your article about the "probable cause" legal standard in criminal matters is very interesting. Prior to practicing law, now, in my 19th year of doing so, I was honored to serve, several years, as N.C. Magistrate, 17-B Judicial District (Surry & Stokes Counties). The "reasonableness" requirement of the Fourth Amendment, as you point out, is the fundamental basis of criminal charges, arrests, or searches. However, in my humble opinion, the very essence of "reasonableness" requires the use of basic "common sense." In other words, whether a Magistrate or law enforcement officer is deciding if "probable cause" exists, the facts and circumstances, which are present at the time of the event(s) that have occurred, are occurring, or are about to occur, are what is, ultimately and clearly, informative and determinative. We do not expect, nor should we, for our Magistrates or law enforcement officers to engage in "complex legal analysis," fully expected of our courts of law, when determining "probable cause" for criminal charges, arrests, or searches. If a Magistrate or the law enforcement officer believes, again, based on the facts and circumstances known, that "reasonable grounds exist that a crime has been committed and the defendant is the person who committed it," then the legal standard of "probable cause," again, in my humble opinion, has been met. Also, if we expect or were to require Magistrates or law enforcement officers to engage in "complex legal analysis" before determining "probable cause," we place an unfair and unrealistic burden on them that, again, in my humble opinion, is neither intended nor required of or by the N.C. General Statutes, the N.C. Constitution, or the U.S. Constitution. In addition, whether a crime is a "misdemeanor or felony," to wit: "less serious or more serious," the basis for determining "probable cause" should, again, be the very same, to wit: "Do reasonable grounds exist, based on the facts and circumstances, that a crime has been committed and the defendant committed it?" The use of "common sense" in the application of this standard is all that should be expected or required of Magistrates or law enforcement officers. Moreover, said standard, in my humble opinion, should not be based on or derived from the "mental gymnastics" of calulating "uncertain and improbable" percentages of the existence of a crime or obtaining evidence of crime. A person with a Ph.D in Mathematics or Statistics might have a "better than average" chance of allocating certain "percentages" to a "probable cause" determination relative to a particular "set of facts," but the end result would still be "speculative" at best.

Furthermore, most Magistrates and law enforcement officers, that I know, do not have Ph.D's nor should they need to in order to exercise basic "common sense" in the performance of their jobs and the decisions that they make. Moreover, some crimes involve "specific intent," but we, most certainly, do not expect or require Magistrates or law enforcment officers to "read minds" before bringing charges, making arrests, or conducting searches of defendants or property. To be sure, at the appropriate time, our courts of law can do the "20-20 hindsight analysis" in reviewing the facts, circumstances, and the applicable law(s) relative to a matter, case, or particular set of facts. If a trial or appellate court, later, determines that "probable cause" did or did not exist at the time of the event or incident involved, giving rise to a criminal charge, arrest, or search, then so be it! That's the way it is and the way it should be! Neither Magistrates nor law enforcement officers are infallible, and they will and do make mistakes, but our courts of law are there to correct said mistakes when they happen. "Probable cause" is a "resonableness" standard…not a standard "beyond all reason." Each and every defendant is "presumed innocent" whether he or she is, in fact, innocent or not. Furthermore, relative to any defendant, it will be the state that will be held to the burden of "proof beyond a reasonable doubt," which, of course, is a higher standard than "probable cause." Hopefully, in due course, "justice" should, eventually, prevail for each and every defendant charged with a crime, innocent or not. On the other hand, when "justice" does not prevail, which, unfortunately, happens too many times, I believe that the Lord, Himself, can and will institute His own form of "justice" that will vindicate the innocent and punish the guilty…believe it or not! Thank you.

Ron L. Jessup, Esq.