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# LAWS OF ARREST AND SEARCH AND SEIZURE

## CHAPTER 9

UTAH STATE BOARD OF EDUCATION
CAREER AND TECHNICAL EDUCATION

# CHAPTER NINE: LAWS OF ARREST AND SEARCH AND SEIZURE

## LAWS OF ARREST

*Detention* is when a person is detained—the person is not free to go, but is not in custody or under arrest. A person may be detained by policy for questioning if the officer has a reasonable suspicion that the person being detained is involved in or a witness to a crime. "Reasonable suspicion" means that if a reasonable person were in the same circumstances, he/she would suspect a crime has been, is being, or is about to be committed.

An officer is allowed to stop and detain a person for the purpose of questioning a suspect or witness of conducting a reasonable investigation. A person who has been detained by an officer is not under arrest, and will be released as soon as the investigation is completed. If, during the investigation, probable cause develops, the individual could be arrested at that time.

An *arrest* is the actual restraint or submission to custody of the person arrested. The person shall not be subjected to any more restraint than is necessary for his/her arrest and detention. An arrest may be made by a peace officer or by a private person (77-7-1, UCA).

The key element of arrest is intent. A person, by law, is under arrest when another person gives notice, usually verbal, that he/she is taking such action, and then assumes custody. Physical restraint alone is not an arrest. An arrest involves four elements:

1. Intent to arrest.
2. Authority to arrest.
3. Subjection to the arrest.
4. Understanding, by the arrestee, that an arrest has been effected.

The person making the arrest shall inform the person being arrested of his/her intention, cause and authority (77-7-6, UCA). This is not required when the person to be arrested is actually engaged in the commission of, or an attempt to commit an offense, or is pursued immediately after its commission or after an escape.

Any person who has committed a crime, regardless of age or mental ability, can be arrested. The determination of culpability or the required culpable mental state is not made by the police, but rather by a prosecutor or a court.

In making an arrest, a peace officer may orally summon as many persons as needed to assist in making the arrest. If an individual refuses to aid an officer, he/she has violated the law. A person is guilty of a class B misdemeanor if, upon command by a peace officer identifiable or identified by him or her as such, he/she unreasonably fails or refuses to aid the peace officer in effecting an arrest or in preventing the commission of any offense by another person.

The Federal Constitution, the Utah Constitution and the Utah Code Annotated (UCA) grant that some individuals are given certain privileges of immunity from arrest. This includes congressmen, legislators, and National Guard personnel while in the performance of their official duties. These individuals may, however, be arrested for "treason, felony, or breach of peace." Breach of the peace could be liberally interpreted to include most misdemeanors.

Diplomatic or consular immunity is granted by federal law to certain representatives of foreign governments. This immunity is based on the practice of national governments of avoiding situations that could be interpreted as political harassment, and to protect their own representatives.

## ARREST WITH A WARRANT

When practical, an arrest with a warrant inserts a neutral official (i.e., a judge), between the power of law enforcement to arrest someone and the citizen being arrested. This allows a judge to screen out arrests that would be legally faulty and restricts potential abuses. A public preference for warrant arrests aids both public relations and the actual ease of arrest.

A signed information must be presented and sworn to before a judge having jurisdiction over the place where the alleged crime occurred. Probable cause must be established to the satisfaction of the judge. In unusual circumstances, a warrant may be issued for a "John Doe," if the person but not his/her identity is known. In Utah, the warrant must have the prior approval of a prosecutor if the offense is a felony or a class B misdemeanor, except in limited emergency circumstances.

Warrants are addressed to all peace officers in the state. They can be served by any peace officer, but cannot be served by citizens. Warrants for felonies can be served at any time, but a misdemeanor warrant can only be served in the daytime. The issuing judge can endorse the warrant for night service, or for service if the person named in the warrant is encountered in a public place for another legitimate police purpose.

Once a warrant is signed by the judge, in most cases the warrant is entered to the State computer system and is accessible throughout the state. Electronic or computer-memory warrants are stored in one of two ways. The first way is entry into an index system that indicates that a written warrant is in existence, although all warrants are not necessarily kept in one central storage area. The second storage method storage in a computer's memory system. This latter type can be printed out when the arrestee is brought in to jail.

Arrest on the basis of such electronic memories is a warrant arrest in a legal sense. Obviously, an electronic warrant cannot be produced at the time of the arrest. However, according to state law, any peace officer who has knowledge of an outstanding warrant of arrest may arrest a person he reasonably believes to be the person described in the warrant, without the peace officer having physical possession of the warrant (77-7-11, UCA).

## ARREST WITHOUT A WARRANT

There are several circumstances under which a peace officer can make an arrest without a warrant having been issued. They are:

- For a public offense committed or attempted in his presence.
- When he has reasonable (probable) cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it.
- When he has reasonable (probable) cause for believing the person to have committed a public offense, and there is reasonable (probable) cause for believing that such a person may:
    - Flee the jurisdiction or conceal himself to avoid arrest,
    - Destroy or conceal evidence of the commission of the offense, or
    - Injure another person or damage property belonging to another person.

In addition to the listed circumstances, the Utah Legislature allows officers to make an arrest without meeting those requirements upon violation of several specific laws.

- The Utah Retail Theft law allows a peace officer, merchant, or merchant's employee who has reasonable grounds to believe that goods may have been taken to detain the suspect in a reasonable manner for a reasonable length of time.
- The Library Theft law states that a peace officer or employee of a library may detain a person if there are reasonable grounds to believe the person has violated laws against library theft.
- A peace officer may make a drunk driving arrest without a warrant at the scene of a traffic accident even though he did not observe the violation, if reasonable cause exists through the testimony of witnesses.

## ARREST BY A PRIVATE PERSON

Utah law allows an individual to make a *citizen's arrest*. However, most departments prefer that a citizen not attempt to make an arrest due to the hazards that may be encountered. The preferred method is to observe the situation and report to an officer what was observed, with the citizen available later as a witness to the occurrence.

A private person may arrest another:

- For a public offense committed or attempted in his presence, or
- When a felony has been committed and he has reasonable cause to believe the person arrested has committed it.

## ARREST DISPOSITION

If an individual is arrested with a warrant, the arrested person must either be immediately booked into jail or brought before the magistrate or judge, in accordance with written instructions on the arrest warrant.

If an individual is arrested without a warrant, by a peace officer or private person, the person arrested shall be taken without unnecessary delay to the magistrate in the district court, precinct of the county, or the municipality in which the offense occurred. An information stating the charge against the person shall be made before the magistrate. If the Justice Court judge of the precinct or municipality or the District Court is not available, the arrested person shall be taken before the available magistrate within the same county who is nearest to the scene of the alleged offense (77-7-23, UCA).

As an alternative to taking the individual before a magistrate, an arrestee may be booked into jail and then released on bail or through pre-trial services on his/her own recognizance (O.R.) or through a supervised release (S.R.).

Another alternative is for the individual to be released on a citation if it is a misdemeanor violation. A peace officer, in lieu of taking a person into custody, may issue and deliver a citation requiring any person subject to arrest or prosecution on a misdemeanor or infraction charge to appear at the court of the magistrate before whom the person should be taken pursuant to law if the person had been arrested (77-7-18, UCA).

- Persons receiving misdemeanor citations shall appear before the magistrate designated in the citation on or before the time and date specified in the citation.
- A citation may not require a person to appear sooner than five days or later than 14 days following its issuance.

- A person who receives a citation and who fails to comply on or before the time and date and at the court specified is subject to arrest. The magistrate may issue a warrant of arrest (77-7-19, UCA).
- A citation must contain:
    - The name and address of the involved court.
    - The name of the person cited.
    - A description of the charge.
    - The date, time, and place the offense occurred.
    - The date the citation was issued.
    - The name of the officer issuing the citation (and the citizen's name in case of a citizen's arrest).
    - The appearance deadline (77-7-20 (2), UCA).

The use of citations is normal for most traffic offenses, but also has great practical value in other misdemeanor situations. The citation process avoids costly jail administrative costs, as well as subjecting fewer persons to the degrading booking process.

The key to releasing an individual on a citation release is the likelihood of his/her appearance in court. It may be necessary to book some offenders in order to ensure their appearance on the charge. Statistics show, however, that with proper screening, well over 90% of all citations issued are properly disposed of before the legal deadline.

This is a discretionary power of the arresting officer and he should consider such factors as the severity of the violation, community ties, occupation, employment, school attendance, relatives in the area, positive identification (picture ID), etc. Many agencies, by policy, establish citation release guidelines.

**SUMMONS**

Another alternative available to a peace officer is a summons. A judge may issue a written summons to a person requiring that person answer to a criminal charge within a certain time period. This is not a warrant of arrest, and is often delivered by a constable who works for the court. It is a discretionary action by the judge, again based on the likelihood of appearance. Failure to appear by the defendant is punishable as contempt of court, for which the judge may issue an arrest warrant.

**USE OF FORCE IN MAKING AN ARREST**

The key to the use of force is the standard that no more force than is necessary is used to effect the arrest and provide for the safety of all involved. If more force than is reasonable is used, the party making the arrest can be liable for both civil and criminal charges.

Any person is justified in using any force, except deadly force, which he reasonably believes to be necessary to effect an arrest, or to defend himself or another from bodily harm while making an arrest (76-2-403, UCA).

If a person is being arrested and flees or forcibly resists after being informed of the intention to make the arrest, the person arresting may use reasonable force to effect the arrest. Deadly force may be used only as provided in Section 76-2-404 (77-7-7 UCA).

In some limited situations, forced entry may be made without warning, such as when the officer's life would be placed in jeopardy or evidence hidden or destroyed. In fresh pursuit cases, the peace officer may legally break open doors, windows, etc., to maintain pursuit in order to re-capture or effect an arrest.

To make an arrest, a private person (if the offense is a felony) or a peace officer (in all cases) may break the door or window of the building where the person to be arrested is, or in which there are reasonable grounds for believing him to be. Before making the break, the person shall demand admission and explain the purpose for which admission is desired (77-7-8, UCA).

**USE OF DEADLY FORCE BY A PEACE OFFICER**

A peace officer, or any person acting by his command in his aid and assistance, is justified in using deadly force when:

- The officer is acting in obedience to and in accordance with the judgment of a competent court in executing a penalty of death.
- The officer is effecting an arrest, or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape, and
    - The officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or
    - The officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed.
- The officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

If feasible, a verbal warning should be given by the officer prior to any use of deadly force, as provided under subsection (1)(b) or (1)(c) of 76-2-404 (UCA).

It is important to note that these are legal requirements as to when deadly force can and cannot be used. Decisions must be made based on agency policies, personal judgment, and moral considerations. The law does not distinguish between juvenile and adult suspects in this matter.

**Practical Exercise**

Define the following:

1. a. Arrest: _____

_____

b. "John Doe" warrant: _____

_____

c. Citation release: _____

_____

d. Probable cause: _____

_____

2. Can a private citizen use deadly force to make an arrest? _____

3. What are the four elements of an arrest? _____

4. Can an officer make a warrant arrest without the warrant in his possession? _____

5. Can a citizen arrest for a misdemeanor not committed in the citizen's presence? _____

## SEARCH AND SEIZURE

Search and seizure is the area of law enforcement that is most confusing to the officer on the street. The Fourth Amendment to the Constitution guarantees that citizens will be free from unreasonable search and seizure, but does not define what "unreasonable" means. The unreasonableness of a search has been defined by appellate courts, and specifically the U.S. Supreme Court, in numerous decisions over the years. But the courts, due to changes in their composition, have frequently changed their collective mind in regard to various aspects of search and seizure. This debate over the unreasonableness of a search can be very confusing for everyone involved in the criminal justice system, because it seems that everyone involved, including the officer on the street, has his/her own opinion of what is reasonable.

## SEARCH WARRANT

A search warrant is an order issued by a magistrate in the name of the state and directed to a peace officer, describing with particularity the thing, place or person to be searched and the property or evidence to be seized by him and brought before the magistrate (77-23-201, UCA).

The law enforcement officer who must obtain a search warrant is required to contact a magistrate having jurisdiction over the geographic area concerned. The officer submits an affidavit, which must specify the premises to be searched and the property to be seized. This information about premises and property must describe both with particularity, meaning in great detail. The affidavit must be based on probable cause and sworn to under oath.

In executing the warrant, any officer can serve the search warrant. The search warrant is valid for a 10-day period and can only be served during daylight hours, unless the judge specifies that it can be served at night.

When serving the search warrant, entry may be made in one of two ways. In most cases, the judge will require an announced entry, where the officer knocks on the door, announces his purpose and authority, and produces the warrant for scrutiny by the citizen. If entry is denied, forced entry may be made. The other option, which the judge must authorize, is the no-knock entry. In this situation, the officers do not announce entry but make an immediate forced entry. This type of entry may be used when there is the possibility that evidence may be destroyed or hidden, or when there is physical risk to any person, including the officers.

There are limitations and stipulations placed on law enforcement officers when executing a search warrant. The courts require that the areas searched and the time spent must be reasonable. The reasonableness standard means that the issuing court will decide after the fact whether the time spent was reasonable, and also whether the officers limited their search to areas in which the items could have reasonably been concealed.

Officers cannot search persons on the premises unless it is specified in the warrant that individuals may be searched. Officer are allowed to do a frisk for weapons if they can explain that they reasonably believe themselves or others may be in danger.

Officers can seize evidence and contraband other than what is listed in the search warrant under what the U.S. Supreme Court has defined as the "plain view" doctrine. If, during the execution of a valid search warrant, the officers see other evidence or contraband in plain view, they are allowed to seize it.

If any items are seized, the officer must provide a receipt for the items taken and leave a copy of the search warrant. The receipt and search warrant are to be left with the person from whom the property was seized, or in whose possession it was found. The officer must promptly return the warrant to the issuing judge with a written inventory of items seized.

## SEARCH OF PREMISES WITHOUT A WARRANT

Only under specific circumstances are law enforcement officers allowed to search a building or residence without a search warrant. The courts have allowed that if exigent circumstances are present, a search can occur without the benefit of a court-ordered search warrant. An "exigent circumstance" is to a situation in which an immediate response or prompt action is required in order to alleviate a problem. The following is a list of circumstances in which the courts have stated that, if time were taken to acquire a search warrant, the effort would be futile.

- Emergencies and life-or-death situations
- Hot pursuit (i.e., a suspect is ready to escape or is actually escaping)
- Evidence is about to be destroyed; this is incident to arrest and limited to the immediate area within reach of arrestee in order to:
    - Protect the officer
    - Prevent escape
    - Prevent evidence from being destroyed

## SEARCH OF A PERSON

As with the search of a premises, acquiring a search warrant before searching an individual is the preferred method. The acquisition of the search warrant is identical to what was described previously and allows a judge to verify that there is probable cause for the search. Upon execution of the warrant, the individual can be forcibly detained if necessary. If a skin search is required, it should only be done in a private place. If a body cavity search is required, the search should be conducted by appropriate medical personnel.

The courts have held that searches done incident to an arrest are valid in order to protect the officer, prevent a possible escape, and preserve evidence. The courts have allowed that the officer can search for weapons, contraband, evidence, fruits of the crime, and instruments used in the commission of the crime.

The officer, or any officer who assumes custody of the arrestee, can search the individual. The search will be conducted irrespective of the gender of the arrestee. Departments train officers on how to search an individual of the opposite sex, and an officer is expected to conduct a thorough search of a suspect or arrestee. An injured arrestee, receiving medical attention, can also be searched. Items or areas that can be searched include the following:

- Items in hands
- Clothing
- Suitcase or purse
- Hair
- The immediate area
- Body cavities, with specific reason to search (preferable to obtain a warrant)

## SEARCH OF A VEHICLE

When an individual in a vehicle has been arrested, the vehicle can be searched incident to the arrest. The area within reach of the arrestee, known as "lunging distance," may be searched for weapons or evidence. If the vehicle is being seized under the laws allowing forfeiture, the entire vehicle can be searched, and may be transported to another location to be searched at a more convenient time. Normally, a vehicle would be seized under forfeiture laws involving narcotics, federal offenses such as contraband liquor, or illegal weapon possession.

An officer is normally required by department policy to do an inventory search on an impounded vehicle (held for its owner, incident to arrest) or a state tax impound. This inventory search is completed in order to safeguard the property of the owner and for the protection of the officer against invalid claims.

The U.S. Supreme Court, due to exigent circumstances involving a moveable vehicle, has allowed law enforcement officers to search a vehicle when certain requirements are met. In *Carroll v. U.S.* and *Ross v. U.S.* (not included), the Supreme Court found that, due to the mobility of a vehicle, law enforcement officers could not be expected to acquire a search warrant and then find the vehicle waiting for them when they returned. The Supreme Court, in its opinion, stated:

> Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant.

With regard to the search of a vehicle, certain situations are not considered to be a search in the legal sense and are not restricted by the Fourth Amendment. They are:

- Checking the vehicle identification (VIN) number on the dashboard.
- Stopping a vehicle to give the driver a citation.
- Shining a flashlight around the interior of a vehicle at night.
- Looking at the outside of a vehicle parked in a public place.

## CONSENT SEARCH

The courts have allowed that a citizen can consent to authorize a search by law enforcement officers. There are a number of elements that must be present in order for the consent to be valid. They are:

- The person who has given consent must have the authority to permit the search.
- The consent must be voluntary.
- The consent must be positive. Silence is not consent.

There are some restrictions involving consent searches:

- The person cannot be tricked into allowing consent.
- Consent given by an individual may be limited to a specific place.
- Consent to enter a house is not consent to search.
- Consent can be revoked at any time.

The person authorizing the search by consent must be the person with the primary right to occupy the premise. If a joint right exists, such as in a shared apartment, either of the parties can consent, unless one has already refused consent. However, if a joint right exists, the consenting party can only authorize the search of his/her property and any common area, but not the property of the other. In the case of a vehicle, the driver can consent to a search even though he/she is not the owner of the vehicle.

## STOP AND FRISK LAW

Utah's Stop and Frisk law is a legal recognition of the right of police to stop and question suspicious persons, and to check for weapons when the officer believes he/she may be in danger. It is based on the U.S. Supreme Court case of *Terry v. Ohio*:

> Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous... he is entitled, for the protection of himself and others in the area, to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

A peace officer may stop any person in a public place when he/she has reasonable suspicion to believe the person has committed, is in the act of committing, or is attempting to commit a public offense, and may demand the person's name, address, and an explanation of his/her actions (77-7-15, UCA).

A peace officer who has stopped a person temporarily for questioning may frisk the person for a dangerous weapon if he/she reasonably believes that he/she or any other person is in danger (77-7-16, UCA).

## EXCLUSIONARY RULE

The *exclusionary rule* is a rule generated by the U.S. Supreme Court requiring that any evidence or testimony that law enforcement officers gain through improper means be excluded from court. The development of the exclusionary rule came about because of two cases, *Weeks v. U.S.* in 1914 (which only pertained to federal cases), and *Mapp v. Ohio* in 1961, which made the rule applicable in all cases nationwide.

## PROBABLE CAUSE, THE ARREST STANDARD

The grounds for obtaining a warrant or for making an arrest are a function of reasoning. At the time the warrant is issued or the arrest is made, the arresting person must be in possession of knowledge that would lead a reasonable and prudent person in the same position to believe that the crime has been committed and that the arrestee committed it. An arrest without probable cause creates liability. The arrested person may prove or be found innocent, but as long as probable cause existed at the time of the arrest, the arrest itself was legal.

Probable cause can be based on any sensory information available to the person making the arrest. The key is the reasonableness of the conclusions drawn from such information. Examples of such information include:

- Sensory observations.
- The nature of the crime.
- Modus operandi (method of operation).
- Personal knowledge of suspect and victim backgrounds (character, past record, reputation).
- Information received from victims, other suspects, other peace officers.
- Reliable informants.
- Electronic communications.
- Computer memory.