

In Search of Search Warrants

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(Course Materials by Bronson Tucker, Director of Curriculum)

1

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2

Resources

- Magistration Deskbook, Chapter 3, Part B
- Code of Criminal Procedure, Chapter 18 & 59
 - www.statutes.capitol.Texas.gov
- www.tjctc.org
 - Legal Question Board
 - Webinars
 - Forms – Coming Soon
 - Special Thanks to TMCEC for the forms packet handout!

3

Today's Roadmap

- Search Warrant Procedures
- Types of Warrants
- Determination of Probable Cause

4

Search Warrant Procedures

5

What is a Search Warrant?

- A “**search warrant**” is a written order issued by a magistrate and directed to a peace officer commanding the officer to search for and seize designated property or things and to bring them before the magistrate.
 - CCP Art. 18.01(a).

6

Step 1 - Application

- Before a magistrate may issue a search warrant, a sworn probable cause affidavit must be filed.
 - We will discuss determining whether or not PC exists later!
 - CCP Art. 18.01(b)

7

Step 1 – Application: Confidential?

Except as provided by Article 18.011, which provides for the sealing of records, the affidavit establishing probable cause becomes public information **when the search warrant is executed.**

The magistrate's clerk must make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

- CCP Art. 18.01(b).

8

- The magistrate issuing a warrant must have jurisdiction over the geographical area to be searched.
 - *Gilbert v. State*
- This means you can only issue warrants to search in your **county**.
 - You are issuing the warrant as a ***magistrate, not as a judge***, so your jurisdiction is county-wide

Step 1 – Application: Where?

9

Step 1 – Application: How?

- The applicant must swear to the information, which may be done by:
 - Being placed under oath
 - Signing an “unsworn declaration”
 - Signing the affidavit in front of officer authorized to administer oaths (you and your clerk qualify)
- The affidavit can be presented either in person **or** by telephone or other reliable electronic means.
 - CCP Art. 18.01(b-1)

10

Step 1 – Application: Electronic Application

- If relying on electronically communicated information, the magistrate may question under oath, the affiant or anyone who gave statements supporting the application.
- CCP Art. 18.01(b-1)

11

Step 1 – Application: Electronic Application

- Additionally, the magistrate may consider additional testimony or exhibits, but the magistrate MUST:
 - Record the testimony (audio recorder, written verbatim, or court reporter);
 - Make sure any transcription is certified as accurate and is preserved;
 - Sign, certify the accuracy of, and preserve any other written record; and
 - Ensure that the exhibits are preserved.
- CCP Art. 18.01(b-1)

12

Step 1 – Application: Electronic Application

- An applicant communicating via electronic means shall:
 - Prepare a “**proposed duplicate original**” copy of the warrant (just means they need to prepare the warrant that will be used), and
 - Read or transmit its contents verbatim to the magistrate.
 - CCP Art. 18.01(b-1)

13

Step 1 – Application: Electronic Application

- The magistrate must create an original search warrant, containing the contents of the “proposed duplicate copy”, either by transcribing it verbatim, or by using the version that is electronically transmitted.
- It must be noted on the magistrate’s copy of the affidavit that the affiant has sworn to the application.
 - CCP Art. 18.01(b-1)

14

Step 1 – Application: Electronic Application

- If the magistrate finds it necessary to modify the warrant from the “proposed duplicate original”, the magistrate must either:
 - transmit the modified version to the applicant by reliable electronic means; or
 - file the modified original and direct the applicant to modify the proposed duplicate original accordingly.
- CCP Art. 18.01(b-1)

15

Step 1 – Application: Electronic Application

- A magistrate who issues a search warrant for which information is provided by telephone or reliable electronic means must:
 - sign the original documents;
 - enter the date and time of issuance on the warrant; and
 - transmit the warrant by reliable electronic means to the applicant or direct the applicant to sign the judge's name and enter the date and time on the duplicate original.
- CCP Art. 18.01(b-1)

16

Step 2 – Issuance of Search Warrant

You, the judge, are legally responsible for preparing the warrant.

Often, the officer has already prepared the warrant and you just need to sign it.

This is fine as long as you read the warrant and make sure there is probable cause before signing it.

17

Step 2 – Issuance of Search Warrant

The search warrant must:

1. Be issued in the name of "The State of Texas";
2. Identify, as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched;
3. Command any peace officer of the proper county to search forthwith the person, place, or thing named;
4. Be dated (including hour) and signed by the magistrate; and
5. Have the magistrate's name appear in clearly legible handwriting or in typewritten form with the magistrate's signature.
 - Code of Criminal Procedure Art. 18.04.

18

Step 2 – Issuance of Search Warrant

- The warrant should contain the specific street address, or a full description of the building and surrounding areas if no address is provided.
 - *Ex parte Flores*

19

Step 2 – Issuance of Search Warrant

- If a person is to be searched, the warrant should describe the person to be searched including any or all of the following, although all need not be present:
 - proper name, nickname or street name;
 - age;
 - gender;
 - height and weight;
 - identifying marks; or
 - ethnic origin.

20

Step 3 – Return of Warrant

- A search warrant must be executed within “3 whole days”
 - This does not count the day of issuance or the day execution
- **Exception:** 15 days if the warrant is issued solely to search for and seize specimens from a specific person for DNA analysis and comparison, including blood and saliva samples
 - CCP Art. 18.07(a).
- The magistrate issuing a search warrant shall endorse on the search warrant the date and hour of its issuance.
 - CCP Art. 18.07(b).

21

Step 3 – Return of Warrant

- When the property to be searched for and seized is found, the officer shall take possession and bring it to the magistrate.
 - CCP Art. 18.09.
- The magistrate should review the search warrant return filed and determine if the warrant was executed, the manner of execution, and if any articles were seized.
 - CCP Art. 18.10.

22

Step 3 – Return of Warrant

- The officer shall retain custody of the seized property until the magistrate enters an order directing the manner of safekeeping the property.
 - Code of Criminal Procedure Art. 18.10.
- The magistrate shall file the search warrant and return and record of any proceedings with the clerk of the court having jurisdiction of the case including the schedule of the property seized.
 - Code of Criminal Procedure Art. 18.15.

23

Types of Search Warrants

24

Types of Search Warrants

“Standard” Search Warrants

Combo Search & Arrest Warrants

Evidentiary Search Warrants

Contraband Search Warrants

Cell Phone Warrants

Administrative Warrants

Warrant to Photograph Injured Child

25

“Standard” Search Warrants

- Art. 18.02 lays out the items that can be the subject of a search warrant. These include:
 - Property acquired by theft or in any other illegal manner.
 - Property designed, made, or commonly used in the commission of a crime.
 - Weapons kept or prepared for the purposes of insurrection or riot.
 - Weapons prohibited by the Penal Code.
 - Gambling devices, equipment, or paraphernalia.

26

“Standard” Search Warrants

- Additional items “standard” search warrants may issue for:
 - Obscene materials kept or prepared for commercial distribution or exhibition.
 - Drugs or controlled substances kept, prepared, or manufactured in violation of the laws of this state.
 - Any property which it is illegal to possess.
 - Instruments or items used to commit a crime.
 - Electronic customer data held in electronic storage – remember location limits!

27

Combo Search & Arrest Warrants

- People can be searched under a search warrant, but not seized.
- However, if the facts presented for the issuance of a search warrant **also** establish probable cause that a person has committed an offense, the search warrant may also order the arrest of the person.
 - CCP Art. 18.03

28

Evidentiary Search Warrants

Under Art. 18.02(10) of the Code of Criminal Procedure, a search warrant may issue for something that may be lawful to possess but is **evidence that a person did (or did not) commit a crime.**

A warrant of this type is called an **evidentiary search warrant.**

The most common example is a warrant to take the blood of someone suspected of DWI and test it for its alcohol content. These **blood warrants** are discussed in more detail later.

29

- A justice of the peace may only issue evidentiary search warrants if their county does not have:
 - A county court-at law,
 - A county judge who is a licensed attorney, or
 - A municipal court of record with a judge who is a licensed attorney.
- Code of Criminal Procedure Art. 18.01(i).

Evidentiary Search Warrants

30

Evidentiary Search Warrants

- A **subsequent** evidentiary search warrant issued to search the same person, place, or thing subjected to a prior search may only be signed by a:
 - District Court judge
 - Court of Appeals judge
 - Court of Criminal Appeals judge
 - Supreme Court of Texas justice
- Code of Criminal Procedure Art. 18.01(d).

31

Evidentiary Search Warrants

- A probable cause affidavit for an evidentiary search warrant must state:
 - That a **specific offense** has been committed;
 - That the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense; **AND**
 - That the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.
- Code of Criminal Procedure Art. 18.01(c).

32

Evidentiary Search Warrants

- An evidentiary search warrant **may not** be issued to search for and seize property or items that are located in an office of a newspaper, news magazine, television station, or radio station.
- Code of Criminal Procedure Art. 18.01(e).

33

Evidentiary Search Warrants – Blood

- Under the Transportation Code, every driver in Texas gives their implied consent to give a breath or blood sample upon request, by the mere act of driving on Texas roadways.
- If a driver then attempts to withhold consent, under certain circumstances a peace officer may seek a warrant to forcibly take a sample of the individual's blood for alcohol testing.
- It is important to keep in mind that these are considered evidentiary search warrants, and therefore only Justices of the Peace in certain counties may issue these warrants, as discussed above.

34

- Additionally, any **attorney** JP may issue a search warrant to collect a blood specimen from a person who is arrested for an intoxication-related offense and refuses to provide a sample of his or her breath or blood.
- However, this authority **does not** extend to other evidentiary search warrants.
- Code of Criminal Procedure Art. 18.01(j).

Evidentiary Search Warrants – Blood

35

Use Your
Flowchart to
Answer the
Questions

Is a search warrant for a weapon that is illegal to possess that LE believes was used in a crime an “evidentiary search warrant”?

Judge Smith is a JP in Lone Star County. That county has no county court at law, and has no municipal court of record. The county judge is a lawyer. Can Judge Smith issue an evidentiary search warrant?

Now assume Judge Smith is an attorney. An affidavit is presented for an evidentiary search warrant for saliva to compare to DNA samples. Can Judge Smith issue it?

36

Contraband Search Warrants

- Warrants to seize contraband as defined in Code of Criminal Procedure Art. 59.01 can only be issued by certain justices of the peace. A justice of the peace may only issue contraband search warrants if their county does not have:
 - A county court-at law,
 - A county judge who is a licensed attorney, or
 - A municipal court of record with a judge who is a licensed attorney.
- Code of Criminal Procedure Art. 18.01(i).

37

- Contraband is:
 - property that is used in the commission of certain crimes,
 - proceeds gained from the commission of those certain crimes,
 - property acquired with proceeds gained from the commission of those crimes, or
 - property used to facilitate the commission of certain crimes.
 - CCP Art. 59.01(2).

Contraband Search Warrants

38

Contraband Search Warrants

- The probable cause affidavit for a contraband warrant must include:
 - Sufficient facts to establish probable cause that a specific felony offense has been committed;
 - That the specifically described property or items that are to be searched for or seized constitute contraband as defined in Article 59.01 of this code; and
 - That the property or items are located at or on the particular person, place, or thing to be searched.
- Code of Criminal Procedure Art. 18.01(g).

39

Cell Phone Search Warrants

- A “cellular phone or other communication device” may be the subject of a search warrant.
 - iPad, laptops, etc.
- Law enforcement must get a warrant before searching a cell phone.
- Such a warrant can only be issued by judge in judicial district of the law enforcement agency that has possession of the phone or where cell phone is likely located.
 - CCP Art. 18.0215.

40

Cell Phone Search Warrants

- The application must be by a peace officer and:
 - identify the cellular telephone or other wireless communications device to be searched;
 - state the name of the owner or possessor of the telephone or device to be searched;
 - state the judicial district in which:
 - the law enforcement agency that employs the peace officer is located, if the telephone or device is in the officer's possession; or
 - the telephone or device is likely to be located.
 - CCP Art. 18.0215.

41

- The application must also state the facts and circumstances that provide the applicant with probable cause to believe that:
 - criminal activity has been, is, or will be committed; and
 - searching the telephone or device is likely to produce evidence in the investigation of the criminal activity described.
- CCP Art. 18.0215.

Cell Phone Search Warrants

42

- Come up with a description of facts that does satisfy the requirement of issuance of a cell phone warrant, and one that does not.
- For 100 bonus points, come up with one that you think is borderline!

Your Turn!

43

Cell Phone Search Warrant Execution

- These warrants are considered “executed” once the electronic communications device is actually seized, even if the information hasn’t been pulled off of the device yet.
 - CCP Art. 18.07(c)

44

Cell Phone Search Without Warrant

- An officer may only search a cell phone with:
 - A warrant as described above;
 - Consent of the owner/possessor;
 - The phone/device is reported stolen;
 - The officer reasonably believes the phone is in possession of a fugitive from justice on a felony offense, or there is an immediate life-threatening situation.*
- * - must obtain warrant as soon as practicable.

45

Cell Phone Data Search Warrants

- Note that the previous slides do not apply to a search warrant for electronic data held by phone servers, which are reachable by “standard” search warrants.
 - For more info on these “ping” warrants, take a look at *Sims v. State* (TX Court of Criminal Appeals) and *Carpenter v. U.S.* (U.S. Supreme Court)

46

Administrative Search Warrants

- An **administrative search warrant** may be issued to a fire marshal, health officer, or code enforcement official of the state, county, city, or other political subdivision
- This warrant allows the inspection of specified premises to determine the presence of a fire or health hazard, unsafe building condition or a violation of any fire, health, or building regulation, statute, or ordinance.
- Must be supported by probable cause.
 - Code of Criminal Procedure Art. 18.05.

47

To find probable cause, the magistrate is not limited to evidence of specific knowledge, but may consider any of the following:

- (1) the age and general condition of the premises;
 - (2) previous violations or hazards found present in the premises;
 - (3) the type of premises;
 - (4) the purposes for which the premises are used; and
 - (5) the presence of hazards or violations in and the general condition of premises near the premises sought to be inspected.
- Code of Criminal Procedure Art. 18.05.

Administrative Search Warrants

48

Warrants to Photograph Injured Child

- A search warrant may be issued to search for and photograph a child who is alleged to be the victim of the offenses of:
 - injury to a child (Sec. 22.04, Penal Code);
 - sexual assault of a child (Sec. 22.011(a), Penal Code);
 - aggravated sexual assault of a child (Sec. 22.021, Penal Code); or
 - continuous sexual abuse of young child or children (Sec. 21.02, Penal Code.)
 - Code of Criminal Procedure Art. 18.021(a).

49

Warrants to Photograph Injured Child

- A warrant issued under this article shall:
 - identify, as near as may be, the child to be located and photographed,
 - name or describe, as near as may be, the place or thing to be searched, and
 - command any peace officer of the proper county to search for and cause the child to be photographed.
 - Code of Criminal Procedure Art. 18.021(c)

50

Warrants to Photograph Injured Child

- The officer executing the warrant may be accompanied by a photographer who is employed by a law enforcement agency and who acts under the direction of the officer executing the warrant.
- The photographer is entitled to access to the child in the same manner as the officer executing the warrant.
- Code of Criminal Procedure Art. 18.021(b).

51

- After having located and photographed the child, the peace officer executing the warrant shall take possession of the exposed film and deliver it forthwith to the magistrate.
- Code of Criminal Procedure Art. 18.021(d).

Warrants to Photograph Injured Child

52

Warrants to Photograph Injured Child

A search warrant under this section shall be executed by a peace officer of the same sex as the alleged victim.

If the officer is not of the same sex as the alleged victim, the peace officer must be assisted by a person of the same sex as the alleged victim.

The person assisting an officer under this subsection must be acting under the direction of the officer and must be with the alleged victim during the taking of the photographs.

- Code of Criminal Procedure Art. 18.021(e).

53

Determination of Probable Cause

54

Probable Cause Affidavit

- Must contain sufficient facts that when coupled with inferences from those facts, establish a fair probability that evidence of a particular crime will likely be found at the specific location.
 - *Illinois v. Gates* (U.S. Supreme Court)

55

Probable Cause Affidavit

- The affidavit MUST:
 - Describe the person, place, or thing to be searched.
 - Name or describe the thing(s) to be seized.
 - Describe the location of the person, place, or thing to be searched in sufficient detail.
 - Ask yourself: “Could I find this person, place, or thing using the information found in the affidavit?”
 - Provide facts that allow the magistrate to reasonably infer that the object(s) of the warrant are present at the suspected premises at the time the warrant is issued.

56

Facts and circumstances that make it **more likely than not** that:

A certain person has committed, or is committing, a certain crime, or	A certain place contains specific items connected to a certain crime.
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Probable cause exists where the police have reasonably trustworthy information that causes a reasonable person to believe a particular person has committed or is committing an offense.

Chapnick v. State, 25 S.W.3d 875

Probable Cause - Definition

57

Magistrate's Determination

- Probable cause is established when it is determined by a neutral, detached, and independent magistrate that the accused **probably** committed the offense alleged.
- Is it more likely than not that the person did it?
 - Yes = probable cause
- It is more than a mere suspicion, but less than beyond a reasonable doubt.
 - *Carroll v. U.S.*, 267 U.S. 132

58

- **YOU** make the decision on whether or not there is probable cause.
 - Just because an officer says there is probable cause doesn't mean there is.
 - Don't trust what the officers says, read the affidavit yourself.

Magistrate's Determination

59

General Guidelines for Finding PC

- 1) It's art, not science:
 - PC is determined on a case-by-case basis, but there are rules to be followed.
- 2) Four corners rule:
 - If it's not in the affidavit, you don't know it.
 - Additional facts from the officer can't be considered.
- 3) Finding of PC based only on facts:
 - Opinions and conclusions in the affidavit should be IGNORED.

60

General Guidelines for Finding PC

4) Hearsay can be included in the affidavit.

- Hearsay is information that comes from someone other than the person talking.

Example:

- Bob assaults Mary and during the assault Bob made a threatening comment.
- Mary tells the police the comment that Bob made.
- What Bob said is considered hearsay when Mary repeats it to the police.

61

General Guidelines for Finding PC

5) Confessions:

- If a confession by the accused (written or oral), plus the elements of the offense are in the affidavit, probable cause is established.

6) Long Narratives don't necessarily mean PC:

- A long narrative may give lots of details but still fail to state essential information such as how and where the information came from and may be full of opinions and conclusions.
- Look for specifics: the affidavit should give facts about the who, what, when, where, why, and how.

62

General Guidelines for Finding PC

- 7) Totality of the Circumstances:
 - Consider all the facts in the affidavit before making a decision.
- 8) Reasonable inferences:
 - Use common sense and don't be hyper-technical.
- 9) Legal or "fancy" wording not required:
 - Don't get worried about misspelled words, bad grammar.
 - If it makes sense and you determine PC, it's fine.

63

- It's your signature and it's the accused's constitutional rights. If you don't have probable cause, the arrest or search will be illegal.

Stay Strong

64

- If you determine the probable cause is insufficient, should you:
 - Explain to the officer what is missing and reconsider once they add the missing information?
 - Deny the issuance of a warrant without comment?
 - Does your answer depend on what is missing?

Insufficient Probable Cause

65

Post-Class Review

- A search warrant is issued for Shayna's blood, to see if she committed DWI. How many days does the officer have to execute the warrant?
- True or false: Every search warrant must allege the commission of a specific criminal offense?
- True or false: Only a district judge can issue a warrant to seize and search a cell phone?
- Officer Traylor emails you a PC affidavit and "proposed original warrant."
 - How could you get Officer Traylor to swear to the affidavit?
 - Do you need to create a new document and input the info from Officer Traylor's "proposed original"?

66

Step 1 – Application: Electronic Application

- If the magistrate finds it necessary to modify the warrant from the “proposed duplicate original”, the magistrate must either:
 - transmit the modified version to the applicant by reliable electronic means; or
 - file the modified original and direct the applicant to modify the proposed duplicate original accordingly.

- CCP Art. 18.01(b-1)

67

Post-Class Review

- Could you consider the following in a PC affidavit and if not, why not?
 - Statement in sworn affidavit that “where there’s smoke there has to be fire”
 - Verbal statement by officer presenting written affidavit that “this guy’s a really bad dude.”
 - Proof of purchase of scales and baggies when requesting search warrant for illegal drugs
 - Statement from drug addict that they purchased drugs at an address where search warrant for illegal drugs is sought

68