

Advanced Arrest

Search & Seizure

Module III.E

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Study Guide

Table of Contents

- Introduction** 3
- Arrest By a Private Person** 6
 - Definitions 6
 - Circumstances For Arrest 7
 - Arrest by a Peace Officer (Penal Code §836) 7
 - Arrest by a Private Person (Penal Code §837) 8
 - Summary and Analysis of Cases Applying Penal Code §837 to Security Officers 9
 - Timing for Arrest. 10
 - Differences Between Penal Code §836 and Penal Code §837 13
 - Requirement of Observation of Misdemeanor by Private Individual 17
 - Reasonable Cause To Arrest (Actions Not Observed) 18
- Use of Force In Making an Arrest 19
 - Penal Code Section 835 19
 - Edson v. City of Anaheim 20
 - People v. Jerome Fosselman (1983) 33 Cal.3d 572 21
 - People v. Dale Michael Piorkowski (1974) 41 Cal.App.3d 324 23
- Detention of an Individual** 25
 - "Reasonable Suspicion" To Detain an Individual 25
 - Temporary Detention May Only Last For a Reasonable Amount of Time 25
- Search Incident To Arrest** 26
 - Fourth Amendment to the Constitution of The United States Of America 26
 - General Rule Regarding the Exclusion of Evidence. 26
 - People v. Garcia (1969) 274 Cal.App.2d 100..... 27
 - Burdeau v. McDowell 28
 - California Authority 29
- The Shopkeeper’s Privilege: Penal Code Section 490.5** 30
 - General Rule/Penal Code Section 490.5..... 31

Search by a Private Person	34
Search of a Person	35
Search of a Person’s Belongings	36
Evidence	41
Statements by the Defendant	42
Observations By The Security Officer	43
Physical Evidence	44
Witness Statements	45
Final Comment	47

Introduction

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . .”

— Fourth Amendment to the United States Constitution

This paradigm taken from our Bill of Rights has guided American Jurisprudence since its inception. We have, as a society, come to expect that our personal rights are free from unwarranted government intrusion. Unlike so many countries in the world where the citizens have no private rights, the United States takes great strides to ensure that the following words are followed: “. . . the right to be secure in their persons [and] houses. . .”

By enforcing the fourth amendment, however, we have found that the penalties for violating its precepts often lead to the frustration of criminals being set free. The American courts have imposed the now well-known Exclusionary Rule to such violations of the Constitution. This means that evidence, including physical objects as well as a suspect’s own statements, will be excluded from evidence during a criminal trial if they were illegally obtained.

We have taken this concept so seriously that even if the illegally obtained evidence was not procured by a police officer, but by a private citizen, the evidence will still be suppressed. Thus, as a private security officer in California, you must learn the law, including the often subtle nuances, to ensure that your actions will be lawful. Only in this way can we ensure that the criminals will be held accountable for their actions. But there are other concerns for you as well.

Not surprisingly, in our litigious society, the good guys often get sued by the criminals. Assuming an arrest was invalid, a search was unreasonable or excessive force was used, the bad guy might sue for a variety of torts: false imprisonment, false arrest, illegal detention, assault, battery, conversion (i.e., theft of personal property), infliction of emotional distress, negligence, negligent hiring, negligent training, negligent supervision, premises liability,

and even violation of civil rights based upon discrimination.

The purpose of this advanced module is to go into a bit more detail than the basic courses dealt with regarding the laws of arrest, search and seizure to assist you as a security officer. Much of this you already know, which is a good thing. Hopefully, you will learn a few additional “golden nuggets” of information.

In this way, we hope to make it more likely than not that the criminals will be punished, and that you and the company you work for will be free from any type of civil liability.

As you already know, our laws are complex, and are made up of both statutory law (such as the Penal Code, Vehicle Code and Health & Safety Code), as well as by common law, which is handed down by the Justices of our state and federal courts in written opinions. These written opinions are just as binding upon us as are the statutes. In fact, the purpose of the courts is often to interpret the statutes, as well as the Constitution, in arriving at its decisions.

This advanced module is limited, primarily to California law, including the interpretation of its statutes and case law. Although much of our legal analysis would probably be applicable in the vast majority of states, it is designed only for learning the applicable laws in this State. Do not assume that the laws you may have learned in another state apply here in California. Similarly, do not assume that the same rules apply elsewhere, in the event you seek employment in another state sometime in the future.

CAVEAT: By learning about the laws of arrest, please never forget that the primary job of a security officer is to observe and report. The purpose of this module is not to encourage you to become an aggressive, over-reaching vigilante, because you know the laws of arrest. To the contrary, it is to provide you with an understanding that you are always best off letting the police do what they do best, and you doing what you do best.

Also, each company you work for may have a different expectation of how assertive they want their security officers to be. This is often a philosophical choice made by the company. Such choices should always be within the law, however, and all policies and procedures should likewise be in agreement

with good legal practices.

As lawyers, we appreciate well-written documentation of an incident. Whether the lawyer is a prosecutor who is using your Incident Report to form the basis of a criminal prosecution, or the lawyer is defending you in a civil lawsuit, using your excellent written account to repel naked allegations that you committed heinous atrocities deserving of money to the plaintiff, be rest assured that we are dependent upon your ability to articulate on paper everything about an encounter.

Nothing beats a great report. Documentation is always the key to success. In the courtroom, it is not what really happened that comes to light, but what the evidence shows. Thus, "if it isn't documented, it didn't happen." This is the key to good observing and reporting. In reviewing these materials, try to think how you would document events if you were the person involved in making the arrest. How would you justify your "probable cause?" What specific acts did the suspect do that you could articulate that would be factual, and not merely your subjective beliefs?

Would your report include an explanation as to why you did what you did? Would it include every possible witness? Does it properly describe the exact location, time and date of the incident? Even though these questions may seem basic, we often find it amazing how, in the heat of the moment and the report writing that usually follows immediately, the "basics" are so often overlooked.

Be diligent in your observations. Be detailed and articulate in your report writing. Most of all, be knowledgeable about the law!

Arrest By a Private Person

As a security officer, an arrest is an act that you may never have to perform but must nevertheless be prepared for. Following a lawful arrest, you are permitted to conduct limited searches and seizures of property.

This course will go into detail, using statutory definitions as well as case law examples of how to proceed lawfully. Your job is to observe and report, sometimes to arrest, and to ensure that the suspects that are apprehended get convicted in court. We want to preserve our evidence and make the best use of the law to protect the public, your client's property and employees.

Learning these points will also help you to limit exposing you and your company to civil liability lawsuits arising from allegations of false imprisonment, false arrest, illegal detention, violation of right to privacy, and other similar issues.

Definitions

To briefly review the basics, an "arrest" occurs whenever one person takes another person into custody. (Penal Code §834.) The arrest is made when a person is actually restrained, or when a person submits to the custody of an officer. (Penal Code §835.) An arrest must be made lawfully; that is, it must be made in a manner authorized by law.

When thinking about an arrest, people usually think about law enforcement officers, including the police, sheriff deputies, etc. However, California law specifically provides that private citizens are allowed to make arrests as well. (Penal Code §834.)

Security officers are not peace officers. Peace officers are provided with different training and have different job duties and responsibilities. For example, security officers are hired to protect specific people and property. Peace officers are responsible for protecting all people and all property. Unlike security officers, peace officers are required to pursue suspects who have committed crimes and try to apprehend them.

A security officer's role is to protect the people and property on the premises of the security officer's employer (or contracted client). A security officer's

primary role is prevention. The security officer is there to help prevent a criminal act from occurring. If the criminal act cannot be prevented, the primary responsibility of the security guard is to observe and report.

Because of the inherent differences between peace officers and security officers, the law treats peace officers and security guards differently.

A security officer's ability to make a lawful arrest is governed by the same laws which govern arrests made by private citizens. Therefore, it is extremely important for a security guard to understand the law with respect to a private citizen's ability to perform a lawful arrest.

There are two California Penal Code sections which describe when an arrest may be made.

Penal Code §836 governs when a peace officer may make an arrest. Penal Code §837 governs when a private citizen may make an arrest.

Circumstances For Arrest

Arrest by a Peace Officer (Penal Code §836)

Penal Code §836 governs when an arrest may be made by a peace officer. As you know, a basic understanding of Penal Code §836 is necessary to allow the security officer to assist in an arrest by a police officer, even though an arrest by a security officer is not governed by this section.

Generally, a peace officer may make an arrest under any of the following situations:

1. Pursuant to a warrant;
2. When the peace officer has probable cause to believe that the suspect has committed an offense in the officer's presence;
3. When the suspect has actually committed a felony outside of the peace officer's presence; and
4. When the peace officer has probable cause to believe that the person to be arrested has committed a felony, even if the suspect has not, in fact, committed any felony. (Penal Code §836(a).)

With respect to the violation of a domestic violence protective order or restraining order, a peace officer may make a lawful arrest if he has probable cause to believe that

1. The suspect has notice of the order and
2. The suspect has violated that order. This is true regardless of whether the violation occurred in the presence of the peace officer. (Penal Code §836(c).)

With respect all other cases of domestic violence, the peace officer may arrest the suspect without a warrant where

1. The peace officer has probable cause to believe that the suspect has committed an assault or battery (even if neither has actually been committed) and he makes the arrest as soon as that probable cause arises. (Penal Code §836(d).)

In the case of a suspect who possesses a concealed firearm in an area of an airport to which access is controlled by the inspection of persons and property, a peace officer may make an arrest if he has reasonable cause to believe the person possesses a concealed firearm and the peace officer makes the arrest as soon as that reasonable cause arises. (Penal Code §836(e).)

Reasonable cause is a higher standard than probable cause, and usually requires more facts. "Reasonable cause" is defined as that state of facts that would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime. This will be discussed in further detail later in this module.

Arrest by a Private Person (Penal Code §837)

A security officer is not a peace officer. As such, the circumstances under which a security officer may make a lawful arrest are the same as those for private persons.

A private person may make a lawful arrest under three different scenarios:

2. When the suspect has committed (or attempted) any public offense in

the arresting person's presence.

3. When the suspect has committed a felony, even if the felony was not committed in the arresting person's presence.
4. When a felony has been committed, and the arresting person has reasonable cause to believe that the person arrested is the one who committed that felony.

Summary and Analysis of Cases Applying Penal Code §837 to Security Officers

Cervantes v. J.C. Penney Co., Inc. (1979) 24 Cal3d 579

This California Supreme Court case clarifies some of the differences between Penal Code §836 and Penal Code §837. It also confirms that private security officers are governed by the same laws which govern private persons making an arrest, rather than the laws which govern arrests made by peace officers. In Cervantes, an off-duty police officer was acting as a private security officer at a J.C. Penney store. The security officer believed he observed the suspect place tools and other items into a bag and then exit the store without purchasing them. The security officer made an arrest upon the suspect. Thereafter, the suspect sued the security guard and J.C. Penney for false imprisonment, malicious prosecution, assault, battery, intentional infliction of emotional distress, and negligence.

First, the California Supreme Court determined that the laws governing a private person making an arrest would apply. Even though the security guard was an off-duty police officer, he was acting as a private security officer at the time of the arrest.

The California Supreme Court then set forth the standard governing a private person's authority to arrest:

"The authority of a private citizen to make an arrest is more limited than that of a peace officer. A peace officer may arrest a person without a warrant whenever he has probable cause to believe that the person has committed a

misdemeanor in his presence. (Penal Code §836(a).) A private citizen, however, may arrest another for a misdemeanor only when the offense has actually been committed or attempted in his presence. (Penal Code §837(1).)”

At the end of the trial, the trial court had provided an instruction to the jury that the arrest would be considered lawful if the security guard had probable cause to believe that an offense had been committed in his presence. This was an incorrect instruction because, as a private citizen, the security guard was only permitted to make an arrest if the misdemeanor offense had actually been committed in the security guard’s presence.

LESSON: Even if the suspect did in fact steal, the security officer violated Penal Code section 837 since it was not literally observed by him. Ironically, a guilty suspect would be able to have his criminal case thrown out. Worse yet, he could then sue the security officer and the security company for false arrest, false imprisonment, battery (assuming he was “touched unwantedly” by the security officer), and negligence. Under this scenario, he would probably win some money. **TIP: Do not arrest anyone for a mere**

misdemeanor unless it is committed in your presence and preferably observed by you.

People v. Raymond Lewis Carter (1982)130 Cal.App.3d 690

In this case, a security officer at FedMart observed the suspect take a hose reel out of its box and place several expensive tools into the box. The suspect then went through the cashier lane by paying for the inexpensive hose reel, rather than the more expensive tools inside. The security officer arrested the suspect.

The arrest was determined to be lawful because the offense in question occurred in the presence of the security guard. Here, the security officer acted properly. The conviction will be upheld and no exposure to a civil lawsuit will exist.

Timing for Arrest.

Even though a private person may make a "citizen's arrest," the arrest must be made in a timely fashion. An arrest is unlawful if not made in a timely fashion.

Imogene Green v. Department of Motor Vehicles (1977) 68 Cal.App.3d 536

In this case, a private person noticed a vehicle being driven erratically shortly before 1:00 a.m. The private person observed the car veer back and forth between lanes, travel through a red light, make several turns on the wrong side of the street, and also pass back and forth over a double yellow line. The private person observed the suspect pull into a driveway. The private person noted the physical characteristics of the suspect. He then located a police officer and told the officer what he had observed, including a description of the suspect's vehicle and physical description.

The police officer went to the suspect's home without the private person. The officer made contact with the suspect and immediately noticed obvious signs of intoxication, including a strong odor of alcohol. However, since the officer had not seen the suspect driving, he could not arrest him for driving while intoxicated.

The police officer located the private person who had observed the suspect driving. The private person was brought to the suspect's home where he was able to positively identify the suspect. The private person then, with the assistance of the police officer, made a citizen's arrest.

The suspect prevailed in an administrative hearing before the DMV on the theory that the warrantless arrest was not valid because it was not made within a reasonable time after the offense had been committed.

The Court of Appeal disagreed. The Court found that the arrest was made within 35-40 minutes of the time the private person observed the suspect park his vehicle in the driveway. The Court held,

"There is no requirement that the citizen keep the offender within view throughout the time intervening between observation of the offense and arrest." (Id. at p. 541.)

The private person had notified the police immediately after observing the

suspect's actions. It was at that point that the private person believed his duties were complete. It was only after the police officer recalled the private person to the scene due to a technicality regarding the arrest that the private person then completed the citizen's arrest. The Court determined that the arrest was made within a reasonable time as,

"This is not a case where the citizen observing the offense went about his other business and then later decided to effectuate an arrest." (Id. at p. 541.)

Jackson v. Superior Court of Merced County (1950) 98 Cal.App.2d 183

This case addresses the issue as to when an arrest may be made. In this case, a deputy sheriff observed a boy shoot a BB gun at a light bulb affixed to a public building. The deputy stopped the boy and told him he should not be playing around the building or shooting the BB gun. This occurred at approximately 1:30 p.m.

The next day, at approximately 5:00 p.m., the deputy went to the boy's home and attempted to arrest him for the incident which had occurred the day before. The boy's parents prohibited the arrest without a warrant. The deputy proceeded to obtain a warrant and arrested the boy as well as his parents for contributing to the delinquency of a minor.

The Court explained that both peace officers and private persons may make arrests without warrants for public offenses committed or attempted in the presence of the person making the arrest. However,

"The arrest must be at the time the offense or any part of the offense is being committed or within a reasonable time thereafter or upon fresh and immediate pursuit of the offender." "It seems to be generally held that an arrest for a misdemeanor without a warrant cannot be justified if made after the occasions has passed, though committed in the presence of the arresting officer."

There is no concrete rule which sets forth the exact amount of time which may elapse between the time of the offense and the arrest. The amount of time which may elapse depends upon the circumstances of the case. Generally speaking, the arrest must be made promptly and as soon as

possible under the circumstances.

Furthermore, the person making the arrest must continue with the progress of making the arrest after the actions which give rise to the arrest have been observed. In other words, there must be a continued pursuit in effecting the arrest. However, if, as in the Jackson case, the officer observes the conduct giving rise to the offense and then proceeds with other business, the officer is obviously not pursuing the arrest and is not making the arrest at the first opportunity. As such, the Court in Jackson determined that the subject arrest was not valid.

The Court held, "In order to justify a delay, there should be a continued attempt on the part of the officer of person apprehending the offender to make the arrest; he cannot delay for any purpose which is foreign to the accomplishment of the arrest." (Id. at p. 187, citing 4 American Jurisprudence § 67, p. 46.)

LESSON: It is always best to effectuate an arrest at the time it is committed. If circumstances warrant, however it may be safer to wait for assistance, either from a fellow security officer or law enforcement. The key here is whether or not you went back to other business before making the arrest, or were you in good faith waiting for the proper events to occur in order to safely make the arrest.

Differences Between Penal Code §836 and Penal Code §837

There are certain significant differences between arrests made by police officers and those made by private security officers. Often, these involve subtle nuances that are difficult to understand the rationale behind the rules. However, keep in mind when learning this material that the law encourages citizens to make use of the police. Our society does not encourage "self-help" in apprehending criminals. The majority of citizens are not trained in the laws of arrest (as you are), nor do they undergo extensive training in the proper techniques in the use of force in order to effectuate lawful arrests.

For that reason, the laws in our state favor an arrest by police officers. It is much more stringent for private citizens. The law forgives police officers if they make honest, good faith mistakes. Even if they are sued civilly, they are

entitled to qualified immunity for their actions so long as they acted in good faith.

You, on the other hand, do not enjoy such immunity (with the one exception of the Shopkeeper's Privilege, discussed later). In other words, if you mistakenly arrest someone, there is no room for error. If you are wrong, you could be civilly liable. Worse yet, you could even be criminally prosecuted for your actions. The law says that "you better be right . . . or else!"

Thus, always keep in mind that your primary duty is not to arrest, but to observe and report, in order to be the best witness for the police and prosecution.

In the required Legal Aspects module, you were taught the elements of crimes and the levels of the offenses. For example, theft of property under \$950 in value is "petty theft," a misdemeanor. Theft of property valued at more than \$950 is "grand theft," and thus chargeable as a felony. The prosecutor, of course, would have the option in certain cases to charge the crime either as a felony or as a misdemeanor, assuming the statute allows for it.

A misdemeanor is any offense punishable by imprisonment in the county jail up to one (1) year. A felony is any crime punishable by imprisonment in the State Prison for a period of more than one year.

Some crimes are "wobblers," meaning the prosecutor can charge the crime as either a felony or a misdemeanor. Grand theft, for example, is such a crime. Often the crime will be charged as a felony and the defendant will be allowed to plead guilty to a misdemeanor.

To determine the proper standard for an authorized arrest, a number of factors must be considered.

- What type of crime is being committed, a public offense (i.e., a misdemeanor) or a felony?
- Who is the arresting person, a police officer or a security officer (i.e., a private person)?
- Was the crime observed?
- Is there probable cause to believe the crime occurred?

Penal Code Section 836 provides the authority for an arrest by a police officer and in very specific situations a citizen's arrest. In general, an arrest by a police officer may be made with a warrant or without a warrant. If the officer does not have a warrant for arrest, the officer must have probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.

This rule regarding an arrest without a warrant for a public offense, also known as a misdemeanor, is different from a police officer's authority to arrest and a private person's authority to arrest. For a misdemeanor or public offense, the police officer must only have probable cause to believe the person to be arrested has committed the offense in the officer's presence. For a private individual, the private individual must actually observe the public offense being committed or attempted to be committed. There is no room for error. This is a severe limitation on the private person's authority to arrest. Failure to understand this could result in civil liability for the security officer.

A police officer can rely upon not only his own observations, but upon hearsay when determining whether there is probable cause for making an arrest. That is, if a citizen told him what happened, even if it occurred outside of the police officer's presence, probable cause to arrest exists for purposes of a felony. If the hearsay statements corroborate some of the officer's own personal observations, assuming the observations itself did not amount to probable cause, the additional information can often be used to show that the crime occurred in the officer's presence.

For example, a man seen running on the sidewalk with a purse in his hand, by itself, would not be sufficient for an officer to say that a crime had occurred in his presence. However, if the officer then sees a woman run out of a store yelling, "he just stole my purse!", that hearsay statement would then be enough for the officer to reasonably conclude that the misdemeanor – theft of a purse – had occurred, and that the running suspect is the guy who did it. The officer did not observe the theft. It did not occur in his presence. But he had sufficient facts to justify the stop.

In sharp contrast, a security officer (or any private citizen for that matter) only has probable cause to arrest for a misdemeanor if the crime was observed in his presence. Interestingly, the woman could effect a lawful misdemeanor

arrest of the guy who stole her purse inside the store, assuming she saw him do it. The security officer who was standing outside where the police officer was standing, however, could not, as he did not observe the crime occur, but only saw it after the fact.

Another example: a police officer observes a suspect stumble in the parking lot while walking from a bar to his car. The police officer sees the man get in the car and start the engine. The police officer now has probable cause to stop and detain the driver even before he starts to drive. While interviewing the suspect, the officer pats down the suspect's outer clothing for weapons (a "Terry Search") and removes an illegally concealed handgun.

As it turns out, the suspect was sober as a jay bird. He just accidentally tripped on a crack in the parking lot. However, the police officer had probable cause to stop and detain and to conduct a pat down for the weapons based upon his reasonable suspicion.

Again, in contrast, the security officer who made the same observation of the "stumble" would have been wrong about the suspect's sobriety. Thus, any detention would have been illegal, simply because the misdemeanor thought to have been committed in the security officer's presence – attempted driving under the influence – was not, in fact committed. Thus, the pat down search of the weapon was not proper, and the evidence was thus illegally obtained. Any detention flowing from the initial stop was improper, and the evidence obtained could be suppressed. Ironically, the suspect could even sue the security officer for false imprisonment.

In regard to felonies for both private persons and police officers, both a private person and a police officer may arrest a person who has committed a felony although not in the presence of the officer or the private individual. In the third analysis, both the officer and the private individual may arrest a person if the officer or the individual has reasonable cause for believing the person arrested has committed a felony. However, for the private individual the arrest must be made when a felony has actually been committed and the private person has reasonable cause to believe the person arrested has committed the felony. For the police officer, the police officer only needs to have probable cause to believe that the person arrested has committed a felony whether or not a felony has actually be committed. Consequently, against the police officer's authority to arrest is broader than the private

individuals.

Notes:

Requirement of Observation of Misdemeanor by Private Individual

Hamburg v. Wal-Mart Stores, Inc. The court in *Hamburg v. Wal-Mart Stores, Inc.* analyzed the issue of a private person's arrest for a commission of a misdemeanor. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497.) In *Hamburg v. Wal-Mart* a store manager made arrests of individuals who were conducting a protest at the Wal-Mart's place of business in Yucaipa, California. The individuals were arrested by the store manager for trespass, a misdemeanor, after they refused to leave the store. The individuals then brought an action against Wal-Mart for false arrest in violation of constitutional rights against Wal-Mart and the store manager.

In *Hamburg*, the Court of Appeal analyzed at length the issue as to whether or not a trespass was committed by the arrested individuals. However, the Court also examined the issue as to whether or not the arrest was valid. The Court stated:

"Furthermore, it is not even necessary to determine whether Appellants committed the trespass for which they were arrested if the offenses (assuming they took place) were not 'committed or attempted' in the presence of the private person who arrested them. 'The authority of a private citizen to make an arrest is more limited than that of a peace officer. A peace officer may arrest a person without a warrant whenever he has probable cause to believe that the person has committed a misdemeanor in his presence. [Citation.] A private citizen, however, may arrest another for a misdemeanor only when the offense has actually been committed or attempted in his presence.' (Italics in the original.)" *Id.* at 512.

The court continues explaining, "The mere fact that the private person has reasonable cause to believe a misdemeanor offense has been committed or attempted in his presence is not enough."

The court further explains, “The reason private persons are held to a higher standard than peace officers is that a citizen ‘has no public responsibility; there is less necessity for such arrest, and more occasion to deter private citizens from taking the law into their own hands.’ (Roth v. Golden Nugget Casino Hotel, Inc., 576 F.Supp. 262, 267.)” Consequently, the private individual must actually observe the actions which amount to a misdemeanor and cannot merely have reasonable cause to believe the misdemeanor was committed. The distinction is somewhat confusing as the misdemeanor arrest for both the police officer and the private individual must be committed in the presence of either the police officer or the private individual. However, the private individual must actually observe the actions which amount to a misdemeanor. For the police officer, the actions must be in his/her presence and have reasonable cause to believe the actions occurred, but the officer does not necessarily need to observe the actions. In the Hamburg case, the store manager provided a declaration stating that he had a good faith belief that the individuals were in violation of the law. However, the store manager did not assert or even imply that the acts for which he arrested appellants were committed in his presence. Consequently, the arrest was found to be invalid. The result was a civil lawsuit for false imprisonment and false arrest.

Reasonable Cause to Arrest (Actions Not Observed)

As with all arrests, an arrest under Penal Code Section 836 for a warrantless arrest must be based on reasonable cause. The officer must have reasonable cause to believe the person to be arrested has committed the offense in his presence or reasonable cause to believe the person has committed a felony whether or not in his presence.

a. Reasonable Cause to Arrest Pursuant to Penal Code § 837 and the case of People v. Terry 2 Cal.3d 362, 393.

A search incident to a lawful arrest is valid. A peace officer may arrest a person without a warrant whenever he has “reasonable cause” to believe that

the person to be arrested has committed a felony.

“Reasonable cause” is defined as that state of facts that would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.

No exact formula exists for determining “reasonable cause.” Each case must be decided on the facts and circumstances presented to the officer at the time he was required to act.

“Reasonable Cause” to arrest requires only a substantial chance of criminal activity. Actual criminal activity does not have to occur.

b. “Reasonable Cause” and “Probable Cause” are the Same.

Cases which discuss whether or not an officer has made a valid arrest will sometimes refer to whether the officer had “reasonable cause” to make the arrest and other cases refer to whether the officer had “probable cause” to make the arrest. In the context of whether the police officer had the proper cause to make the arrest, the terms “reasonable cause” and “probable cause” are interchangeable. (See, *People v. Knight* (2004) 121 Cal.App.4th 1568, 1573.) However, a “reasonable cause” for a security officer is a higher standard than mere probable cause for a police officer. In other words, you must have more articulable facts.

Use of Force in Making an Arrest

Penal Code Section 835

Regardless of whether the arrest is being made by a peace officer or a private person, the person making the arrest may only use that amount of force which is reasonable under the circumstances. (Penal Code §835.)

Penal Code §835 governs the method of making arrests and the amount of restraint allowed. Specifically, Penal Code §835 states:

“An arrest is made by an actual restraint of the person, whereby submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention.”

In other words, the person making the arrest may only use that amount of

force which is reasonably necessary for the arrest and detention of the suspect. Whether the force used is “reasonable” or not will depend upon the circumstances.

For example, Penal Code §843 states:

“When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest.”

Consequently, the amount of force that may be determined to be reasonable depends upon the circumstances of each case.

For example, there are different guidelines regarding reasonable force for : arrest pursuant to a warrant, reasonable force for a warrantless arrest, reasonable force for an arrest of a misdemeanor, and reasonable force used for a person suspected of committing a felony.

Furthermore, Penal Code Section 835 in regard to the use of force to effect an arrest, prevent escape or overcome resistance states:

“Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.”

“A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.”

Edson v. City of Anaheim

In *Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, a suspect was shot and killed by a police officer while the officer was attempting to make an arrest. Although the suspect was allegedly just out running an errand for his wife, he engaged the police in a high speed vehicle chase.

The suspect then exited his vehicle and ran into a motel parking lot. The suspect ran to the top of the stairs onto a balcony. The police yelled for the

suspect to stop and put his hands up. The suspect ignored the commands and continued to run throughout the motel balcony. The suspect then stopped in front of a room and reached into his waistband. At this time, one of the officers believed the suspect was reaching for a gun. The officer shot and killed the suspect.

The officer testified that if the suspect had stopped at any point, or had obeyed any of his commands, the arrest would have been made without the shooting. The question before the court was whether or not sufficient facts were presented to prove that the officer used unreasonable force under the circumstances.

The Court first explained that a police officer “may use reasonable force to make an arrest, prevent escape or overcome resistance and need not desist in the face of resistance.” See Edson at p. 1272, 1273. The Court further analyzes the distinction between a police defendant and a private citizen. The Court stated as follows:

“Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because ‘the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.’ (Graham v. Connor (1989) 490 US 386, 396)”

People v. Jerome Fosselman (1983) 33 Cal.3d 572

In the case of People v. Jerome Fosselman the California Supreme Court was presented with the issue of reasonable force, self-defense, justification for actions and a right to defend oneself. In Fosselman the defendant Mr. Jerome Fosselman followed a young woman at approximately 6:35 a.m. as she walked to board a bus. Mr. Fosselman followed the woman for about a block and he then approached her and put a knife to her back. The young woman felt the knife at her back and he also slightly cut her finger. The defendant lost his balance as he attempted to grab the woman.

The woman was able to run away and stop a car that was approaching. There were four individuals in the vehicle. One individual brought the young woman to a phone to call the police. Two other women in the car chased the defendant in their vehicle and a fourth individual, a male by the name of

Robert Lasco, chased defendant on foot through a parking lot and into a street. The individuals were able to stop the defendant. The defendant stated he had done nothing wrong and began to walk away. Robert Lasco at this point turned the defendant around, grabbed him by the shoulders and attempted to knee the defendant in the groin. The defendant then struck Robert Lasco and fractured his jaw. The women were able to wrestle the defendant to the ground where they held him until a gas station attendant arrived and tied the defendant up with jumper cables.

This sequence of events presents a factual scenario wherein private individuals made an arrest and detained an individual. The individual fought back causing injury to one of the arresting citizens. Furthermore, the private citizens engaged in physical conduct with the defendant whom they were placing under arrest.

Defendant was charged with attempted burglary, assault with a deadly weapon, false imprisonment and battery causing serious bodily injury. At the time of trial Fosselman argued the act of striking Lasco which was the basis for the battery charge, was justified on the ground of self-defense.

In analyzing this issue, the Court first found that there was no right to defend against a valid arrest. The Court cited the case of *People v. Score* (1941) 48 Cal.App.2d 495. However, the arrest must be a valid arrest. In this situation as Lasco properly attempted to arrest defendant, defendant did not have a right to defend against this valid arrest.

Citing the general rules set forth in Penal Code § 837, the Court stated, "A citizen may arrest another if a felony has in fact been committed and he has reasonable cause to believe that the person to be arrested committed it." *Id.* at p. 579. The Court analyzed the situation to the general rule finding that the defendant had committed a felony and Lasco had reasonable cause to believe defendant was the person who had committed the felony. Note: Lasco did not observe the defendant commit any felonious act but was nevertheless able to perform a valid arrest as Lasco had reasonable cause to believe the defendant had committed the felony and the felony had actually been committed. Consequently, when Lasco first attempted to restrain the defendant the defendant should not have resisted Lasco's actions. Lasco was entitled to use reasonable force to detain the defendant.

People v. Dale Michael Piorkowski (1974) 41 Cal.App.3d 324

Dale Michael Piorkowski was convicted of involuntary manslaughter after Mr. Piorkowski shot a young man who Mr. Piorkowski believed had participated in a burglary of a dry cleaners. As you know, "Burglary" is the entering of a building with the intent to commit a crime, such as theft, inside. On the day of the incident Mr. Piorkowski worked in an establishment in a shopping center. As he walked through the shopping center he noticed three young men climb over the counter of a dry cleaners. He then observed the three young men walking away from the dry cleaning establishment. Mr. Piorkowski went into the dry cleaners and asked the manager if everything was alright. The manager stated that money from her purse had been stolen. Mr. Piorkowski then started chasing the youth. Mr. Piorkowski then unholstered a gun, caught up to the young men and ordered them to stop running. Two of the men complied. The third did not. Mr. Piorkowski then grabbed this young man and the young man struggled. During the struggle Mr. Piorkowski's gun was fired. The gunshot killed one of the youths.

In analyzing these unfortunate circumstances, the Court first set forth in the requirements of Penal Code § 837 for arrest by a private person. Consequently, a felony must in fact have been committed. Once the requirements of Penal Code § 837 are met, then the analysis continues with a determination as to whether or not there was justification for the defendant to use the force involved in making the arrest. In this situation the Court found that there were sufficient facts to establish the necessary elements of a burglary committed by the young man. Mr. Piorkowski had reasonable cause for believing the person he sought to arrest had committed the burglary and in fact the burglary had actually been committed by the individual. However, Mr. Piorkowski was charged with involuntary manslaughter based on the assertion that the force used to effect the arrest was unreasonable. Mr. Piorkowski argued that his actions were justified and excusable.

Although Mr. Piorkowski argued that his actions were justified and excusable, the court disagreed. The use of deadly force by a private citizen to stop property thieves was not reasonable. They posed no physical danger to persons and no threat of immediate violence occurred.

LESSON: Although there is no hard and fast rule, common sense should always be applied. Deadly force should only be used to save lives. Otherwise, observe and report. Be a good witness for the police.

Notes:

Detention of an Individual

The temporary detention of an individual is different than an actual arrest. An officer may temporarily detain an individual for the purpose of investigating whether a criminal activity is in progress.

"Reasonable Suspicion" To Detain an Individual

A detention is reasonable when the detaining officer can point to specific articulable facts that, considered in light of the totality of the surrounding circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.

An officer's reasonable suspicion may be justifiable even if the conduct in question has an innocent explanation.

"Reasonable suspicion" can be established with information that is different in quantity or content than that required to establish probable cause.

Furthermore, "reasonable suspicion" can arise from information that is less reliable than that which is required to establish probable cause.

Temporary Detention May Only Last For a Reasonable Amount of Time

An investigatory stop exceeds constitutional bounds when extended beyond what is reasonably necessary under the circumstances that made its initiation permissible.

Circumstances which develop during a detention may provide reasonable suspicion to prolong the detention.

There is no set time limit for a temporary investigative stop. The question is whether the officer diligently pursued his investigation in order to quickly dispel or confirm his suspicion of criminal activity. A few seconds will almost never be deemed a detention. A few minutes can certainly be looked at as a detention, depending on the circumstances. The bottom line is whether the individual, in his own mind, felt that he was free to leave or not.

Search Incident To Arrest

As we stated at the outset of this module, our Fourth Amendment to the United States Constitution is often the guiding principle in our legal system. All violations of the rule result in the penalty of the Exclusionary Rule, previously discussed. The rationale is that the violation has “poisoned the tree.” Thus, any piece of evidence that flows from the illegal conduct is merely “fruit of the poisonous tree,” and must also be considered poison. That is, it is suppressed in criminal trials.

Fourth Amendment to the Constitution of The United States Of America

The Fourth Amendment to the United States Constitution provides the right for all people to be secure in their homes and personal effects against unreasonable searches and seizures. Specifically, the Fourth Amendment to the United States Constitution states:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

General Rule Regarding the Exclusion of Evidence.

Consequently, the Fourth Amendment confers upon the people of the United States the right to be protected against unreasonable searches and seizures. The remedy or effect of an unreasonable search and seizure is that the items unreasonably seized in violation of the Fourth Amendment may not be admitted into evidence in a criminal proceeding. This exclusion of evidence obtained in violation of the Fourth Amendment is known as the “exclusionary rule.” The United States Supreme Court in the case of *Mapp v. Ohio* (367) U.S. 643 (1961) made the application of the federal exclusionary rule applicable to states.

The primary purpose of the exclusionary rule is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth

Amendment against unreasonable searches and seizures.

Whether a search is unreasonable under the Fourth Amendment, and therefore requires exclusion of evidence, turns upon whether a person has a constitutionally protected reasonable expectation of privacy, i.e., whether he or she has manifested a subjective expectation of privacy in the object of the particular search that society is willing to recognize as reasonable.

People v. Garcia (1969) 274 Cal.App.2d 100.

In the case of *People v. Garcia*, Mr. Garcia was stopped by a private citizen, Thomas Edwards, at an apartment complex. Mr. Edwards, the manager of the apartment complex, observed defendant looking through a window of an apartment that had been a subject of prior burglaries. Edwards thought Garcia intended to burglarize the apartment. Defendant Garcia ran from Edwards. Edwards caught up to Garcia. Garcia tried to break away and a fight ensued. During the struggle Garcia hit Edwards in the chest and in the arm.

The police arrived shortly thereafter. Pursuant to the advice of the officers, Edwards placed Mr. Garcia under citizen's arrest. The officers then conducted a pat down search for weapons. The officers felt broken glass through the clothing of Mr. Garcia. Believing the broken glass could be used as a weapon the officer reached into the pocket of Mr. Garcia and located broken eyeglasses. The officer also retrieved from this pocket several cigarettes which turned out to be marijuana.

At the time of trial defendant Garcia moved to strike the evidence obtained in the search on the basis that it was not seized pursuant to a legal arrest. Garcia argued that the citizen's arrest was illegal and that there was no arrest by the police officers before the search and no probable cause for arrest. Consequently, the search was not incident to a lawful arrest. The Court of Appeal found that Edwards had a right to arrest defendant for a public offense committed or attempted in his presence. The Court agreed with the contention that Garcia committed attempted burglary, disorderly conduct, trespass and assault and battery in the presence of Mr. Edwards. Consequently, the citizen's arrest was valid. The Court explained: "When Edwards took defendant by the arm and told him he was going to call the police he effected a citizen's arrest which, as pointed out above, he was

justified in making for attempted burglary, disorderly conduct and trespass. [Citations omitted.] At that time it was defendant's duty to remain passive. [Citations omitted.] When [Garcia] struck Edwards on the chest and arms it constituted an assault even though defendant's objective may have been escape or withdrawal . . . Accordingly, when defendant resisted the arrest and assaulted Edwards he added another crime to those for which he had been arrested."

Burdeau v. McDowell

However, the United States Constitution and the Fourth Amendment in particular protects individuals only from governmental actions. The Court in *Burdeau v. McDowell* 256 U.S. 465 (1921) held that the exclusionary rule does not preclude the introduction of evidence obtained by an illegal search performed by private citizens. In the *Burdeau* case, an individual stole private papers from the defendant's office. The private individual actually drilled into a safe of the defendant in order to obtain the documents. The thief who stole the papers then submitted the documents to the Department of Justice. The Department of Justice relying on the documents charged the defendant with the criminal act of mail fraud. The defendant argued at the time of trial and also on appeal to the Supreme Court that the documents should not be admitted into evidence under the exclusionary rule of both the Fourth and Fifth Amendments to the United States Constitution. The United States Supreme Court stated:

"The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen and the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued."

The Supreme Court in applying the facts of this case to the Fourth Amendment found that the documents were not seized by a governmental authority. In fact, the governmental authority, the Department of Justice, did not have any knowledge of the documents until several months after they were stolen. Consequently, the United States Supreme Court found that the

defendant's Fourth Amendment rights had not been violated because the action of stealing the documents was the act of a private individual and not a governmental entity.

California Authority

Formerly, under the "independent grounds" doctrine, evidence that was obtained in violation of the unreasonable search and seizure provision of the California Constitution could be excluded, even if the obtainment of that evidence did not violate the unreasonable search and seizure provision of the United States Constitution. Even though the language in the California Constitution is substantially identical to that of the United States Constitution with respect to unreasonable searches and seizures, the California Supreme Court interpreted the California Constitution to be more stringent than the United States Supreme Court. (See, e.g., *People v. Brisendine* (1975) Cal.3d 528, 545; *People v. Longwill* (1975) 14 Cal.3d 943, 951.)

However, the "independent grounds" doctrine was abolished by the Truth in Evidence provision of Proposition 8. The purpose of this provision was to eliminate independent state grounds for excluding illegally obtained evidence, thereby leaving the standards established by federal courts interpreting the United States Constitution as the sole basis for exclusion. (See, *In re Lance W.* (1985) 37 Cal.3d 873.)

The Shopkeeper's Privilege: Penal Code Section 490.5

When a security officer, or any other person for that matter, unlawfully detains another person, he or she may be held both civilly and criminally liable for such conduct. This means that the person who was unlawfully detained may file a lawsuit against the security officer, his/her employer, and the business at which the security officer was working.

In a civil action, False Imprisonment occurs when:

- (1) the person was in custody,
- (2) there was an unnecessary delay in releasing the person,
- (3) the person did not consent to the delay,
- (4) the person was harmed, and
- (5) the security guard's actions were a substantial factor in causing harm to the person. (California Civil Jury Instruction 1407.)

False Imprisonment can occur even when the person detained has only been detained for a short period of time.

False Imprisonment does not require physical detainment, nor does it require that the security officer to bring the person into a locked office. Every time you stop a person for any appreciable length of time, and the person reasonably believes that he or she is not free to leave, that is a detainment which may be deemed a false imprisonment (assuming it was unjustified).

Of course, the suspect would have to show that he or she suffered some form of harm as a result of the detainment. However, the harm suffered by the person detained could be psychological harm, which may be proved merely by the suspect's own testimony.

False Imprisonment is usually alleged when a person is detained and then brought into a back office for more thorough questioning. However, as discussed below, shopkeepers and their agents (including security officers) can obtain complete immunity from a claim of false imprisonment provided

that they meet the requirements of the Shopkeeper's Privilege. For this reason, it is critical that the security officer write in his/her report or log as much information as possible regarding the detention, including the reason and purpose for the detention, how long the detention lasted, and whether the suspect consented to the detention.

Witnesses are always helpful with respect to establishing the privilege. This will help ensure that the person detained does not fabricate stories of what occurred during the detention, including allegations of battery, torture, or sexual assault. If at all possible, make sure that someone else (another security officer, a store manager, etc.) is present during the detention.

General Rule/Penal Code Section 490.5

In California, there is a specific Penal Code Section which provides the rules regarding when and how a shopkeeper or the shopkeeper's agents may stop and detain a person suspected of shoplifting. This area of the law is of utmost importance to the security officer professional. What actions are allowed and what actions are prohibited must be understood and memorized by the security officer.

A security officer and merchant who comply with the shopkeeper's privilege are entitled to immunity from civil liability!!!

California Penal Code §490.5 allows for a retailer and/or their agents to stop and detain persons reasonably suspected of shoplifting for the purpose of investigation, reclaiming the property, and to prevent escape. A security officer assigned to a retail post is an "agent" of the retailer and, thus, falls within the protection of this section (provided the security officer complies with this section).

Specifically, Penal Code §490.5 states:

"A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises."

"In making the detention a merchant may use a reasonable amount of non-

deadly force necessary to protect himself or herself and to prevent escape of the person detained or the loss of property.”

This one paragraph instills several necessary requirements upon the security officer.

Reasonable Time: The security officer may only detain the suspect for a reasonable amount of time. The security officer should always include in the security report or log the exact time in which the detention began and ended. The end of the detention is when the suspect is no longer being detained by the security officer, e.g., the time in which the suspect is released, turned over to the authorities, etc.

Reasonable Purpose: The security officer must have a purpose for the detention. For example, if the security officer witnessed the suspect place a store item into his pocket and then exit the store without paying for that item, it would be reasonable under those circumstances to detain the suspect. However, if the security officer detained the suspect solely because of the suspect’s ethnicity or the way she was dressed, that would not be a reasonable purpose to support the detention of the suspect.

Articulated Purpose: The security officer must be able to articulate the actual purpose for the detention with specificity. For example, a specific, articulated purpose may be, “I saw the suspect take two packages of batteries from the shelf in aisle three. I saw the suspect place the batteries in his coat pocket. I watched the suspect as he walked past the cashier and out of the store without paying for the batteries.” If you cannot specifically articulate the reason why you have detained the suspect, there is a strong probability that it was not reasonable for you to detain the suspect under the circumstances.

An example of a poorly articulated purpose:

“The suspect was in the aisle of the store with his hands inside his coat pockets. I noticed that upon looking up in my direction, he looked nervous. He then left the store. Believing that he was probably hiding some store merchandise in his coat, I grabbed him just outside of the store and, after a brief struggle, was able to subdue him. I went in his pockets, but could not find any store merchandise. It must have fallen out during the struggle.” Here, the security officer did not observe any crime committed. He merely

had a suspicion, which was no more than a “hunch,” which is insufficient for a stop. The officer will likely be looking at a nice little civil lawsuit against him.

Reasonable Investigation and Manner: Investigation must be conducted in a reasonable manner. For example, Penal Code Section 490.5(f)(3) allows the security officer to examine any items that are “in plain view” in order to determine the proper owner of that item.

Penal Code Section 490.5(f)(4) allows the security officer to request the person detained to surrender the items that are suspected to be stolen. If the suspect refuses to surrender the item(s), the officer may conduct a “limited and reasonable search” to recover the item(s). The Penal Code is very specific regarding what is allowed during this search. First, the search is always governed by reasonableness. If the security guard believes that the search is unreasonable, that action should not be taken!!

The Penal Code allows the security officer to search “packages, shopping bags, handbags or other property in the immediate possession of the person detained.” The security guard may NOT search any clothing worn by the person. If you believe that the suspect possesses stolen merchandise inside his or her clothing, it is best to detain the suspect until the police arrive.

Upon discovery of any item possessed by the suspect, or upon surrender of that item by the suspect, the security guard may request that the suspect provide adequate proof of his or her identity. The suspect, however, is not required to provide this information to the security officer.

In sum, a suspected shoplifter can be detained where there is reasonable cause to believe that the suspect has unlawfully taken or attempted to take an item from the store. This is not an arrest. This is merely a temporary detention in order to investigate the reasonable belief the security officer has that a theft has occurred or was attempted.

Deadly force may never be employed. Reasonable non-deadly force may be used to effect the detention when the suspect resists detention. What amount of force is reasonable depends upon the circumstances.

Following a request to surrender an item which the security officer believes has been taken, the security officer may search the suspect’s belongings. However, this is limited to shopping bags, handbags, and other items on the

suspect's person. The security officer may not search the suspect's clothing or apparel.

Following detention, if it is determined that a shoplifting has occurred (or was attempted) and charges are to be pressed against the suspect, the suspect must be turned over to the appropriate law enforcement authorities. This must occur within a reasonable period of time following the start of the detention. What is considered to be a reasonable amount of time will depend upon the circumstances of the case.

Search by a Private Person

The constitutional guarantee against unreasonable searches and seizures protects against governmental actions. The rule that evidence obtained in violation of the Fourth Amendment was set forth to prevent the government from conducting unlawful searches and seizures. As such, evidence that is illegally obtained by private persons acting in a private capacity will ordinarily be admissible in court. However, as with any rule, there are exceptions.

Cases

In Krauss v. Superior Court (1971) 5 Cal.3d 418, a hotel maid was cleaning the Defendant's room when she saw a cigarette package on the night stand. She opened the package to see if it was empty so she could throw it away. However, inside the cigarette package was a plastic baggy which contained marijuana. The maid put the baggy back into the cigarette package and called the police.

The officer arrived at the hotel and the manager allowed him into the room. The officer looked into the cigarette package and saw the marijuana. The officer left to obtain a warrant. The officer prepared an affidavit based upon the initial information provided by the hotel maid and left out any information regarding his own entry into the room. The officer obtained the warrant, returned to the hotel room, seized the marijuana, and arrested the Defendant.

The Court found that the officer's initial entrance into the hotel room and inspection of the cigarette package were unlawful. However, the marijuana was not excluded from evidence because the warrant was issued solely based upon the facts presented to the officer by the hotel maid. In other

words, the maid's entry into the hotel room and search of the cigarette package was lawful, whereas the officer was not permitted to engage in the same conduct.

While the exclusionary rule does not ordinarily apply to private persons, it may apply to security officers based upon the circumstances of the particular case.

In **People v Zellinski (1979) 24 Cal.3d 357**, a store detective witnessed the suspect attempt to shoplift store merchandise. The detective arrested her and conducted a search of the suspect's person and purse. The store detective found a vial containing heroin inside her purse. The store detective called the police who arrested the suspect for unlawful possession of heroin.

The Court found that the vial had been illegally seized by the store detective and that evidence should be suppressed.

The store detective had the right to detain and/or arrest the suspect under either the Shopkeeper's Privilege (Penal Code §490.5) or the citizen's arrest statute (Penal Code §846.) However, neither of these statutes permitted the store detective to conduct the search made in this case. Penal Code §490.5 permits the search of items in plain view which the person has probable cause to believe have been unlawfully taken. Penal Code §846 permits a search for weapons, but not a search for contraband. In this case, the store detective should have detained the suspect for the police to conduct a search rather than performing the search himself.

The fruits of an illegal search conducted by a security officer are ordinarily only excluded when the security officer is acting in concert with the police, or when the police are silently standing by. In this case, the store detective held the suspect for criminal process and conducted a search. The Court likened this to an action by the state and excluded the vial of heroin from evidence in the case.

Search of a Person

Cases

In **People v. Crowder (1982) 136 Cal.App.3d 841**, the suspect called a drug store pharmacy, identified himself as a particular doctor, and ordered a

prescription to be filled. The pharmacist knew the doctor in question and suspected that the person calling was not really that doctor. After hanging up the phone, the pharmacist called the actual doctor, who confirmed that he had not called in the prescription. The pharmacist notified the security officer on duty and waited for the suspect to arrive.

When the suspect arrived, the pharmacist provided him with the prescription. The security officer then arrested the suspect and removed the prescription from the suspect's pocket.

The prosecution never argued that the search of the suspect's clothing was incident to a search for weapons. The trial court denied the defense's motion to exclude the pills from evidence. The trial court denied that motion, the pills were admitted into evidence, and the suspect was convicted.

On appeal, the court found that the security officer's search of the suspect's pockets was an impermissible search of the suspect's clothing. As such, the pills should have been excluded from the evidence at trial. However, the appellate court did not reverse the suspect's conviction because it found that there was ample evidence to convict the suspect, even if the pills had been excluded. For example, at trial, the pharmacist, security officer, and the suspect himself, all testified that the suspect took possession of the pills inside the pharmacy.

While the conviction of the suspect was upheld in that case, you should never assume that you can get away with an illegal search because you believe that there is sufficient evidence to convict a defendant. Always follow the law when you are making a citizen's arrest.

Search of a Person's Belongings

Cases

In **People v Zellinski (1979) 24 Cal.3d 357**, a store detective witnessed the suspect place a blouse from the store into her purse. The suspect then placed her purse into a straw bag being sold by the store. The suspect also selected a pair of shoes which she paid for and then exited the store.

The store detective arrested her outside and brought her back into the store office. He briefly left as a female security officer performed a cursory

weapons search of the suspect. The store detective reentered the office and opened the suspect's purse where he found the blouse. He also found a small vial on top of the blouse. The detective opened the vial and found heroin inside. The store detective then called the police.

The suspect was charged with possession of heroin. However, the suspect's conviction was overturned because the California Supreme Court found that the store detective engaged in an illegal search and seizure. The initial detention and search for weapons was permissible. However, the store detective was not permitted to open the vial.

Under the Shopkeeper's Privilege, the store detective was limited in searching for the property taken. Had he waited for the police, they would have had probable cause, based upon the detective's statements, to place her under felony arrest for commercial burglary, a felony, and could have conducted a full search prior to transporting her. The vial would have been properly opened and the evidence would not have been suppressed

In **People v. Patel (1981) 121 Cal.App.3d Supp. 20**, the security manager of a local department store witnessed a suspect remove a price tag from an expensive electronic game and place a price tag from a less expensive item in its place. The suspect then took the game to the cashier and paid the less expensive price. The security manager watched as the cashier placed the game into a brown paper bag and hand it to the suspect. The suspect then attempted to leave the store. The security manager stopped the suspect and led the suspect into a back office where the game was removed from the bag.

The appellate court found that this was a reasonable search and seizure. The security manager never lost sight of the electronic game. The game did not leave the manager's plain view when it was placed into the bag, it merely "had a different cover." There was nothing else in the bag, so there was no danger that the security manager would intrude into the suspect's personal effects.

In **People v. Buonauro (1981) 113 Cal.App.3d 688**, a drug store manager saw the suspect standing behind an employee counter where certain expensive items were kept. The manager stepped away for a moment. The suspect was no longer behind the counter when the manager returned. Another shopper

approached the manager and gave him the physical description of a woman she saw place two radios in her purse. The physical description matched the woman the manager had seen behind the counter.

The manager found the suspect was still in the store. He approached her and asked her if she would accompany him to the back office because he wanted to see what was inside her purse. The suspect pulled a radio out of her purse, tossed it to the manager, and tried to run away. The manager, however, saw that another radio was still in her purse. The manager caught up with the suspect and informed her that she was under citizen's arrest. The manager told her that she would have to accompany him to the store office, or else she would be forced to do so. The suspect resisted. Two female employees grabbed the suspect by her arms, and the manager pushed her from behind.

The manager asked appellant for the second radio. The suspect took the second radio out of her purse. The manager asked her if she had any money to purchase the items. The suspect said "No." The manager then asked her to fill out a form. The suspect wrote down a false name and address. A deputy sheriff was called and the appellant was arrested.

The suspect argued to the court that her detention was unlawful. However, the court found that the manager was within his rights to detain the suspect based upon his seeing the suspect behind the employee counter and the statement from the witness who saw the suspect place merchandise into her purse.

The court also found that the manager's citizen arrest of the suspect was also lawful. A private person may arrest another for a public offense committed or attempted in the person's presence. In this case, the suspect committed an offense when she tried to flee with the second radio (which the manager saw) in her purse.

Finally, the court found that there was no unlawful search. In fact, there was no search at all. The manager asked the suspect for the other radio and the suspect voluntarily took the radio out of her purse and handed it him.

The easiest way to avoid an accusation of an unlawful search is to ask the suspect to empty his or her pockets (or purse). Alternatively, if you have witnessed the suspect place an item into his or her pockets (or purse), demand that the merchandise be returned. If the suspect complies, then no

search has occurred and the suspect cannot argue that you performed an unlawful search.

The suspect also argued that the evidence of her provision of false information should be excluded because she was not first advised of her Miranda rights. Miranda rights are those rights which a peace officer must recite to a suspect prior to questioning. Miranda rights are usually stated as follows: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand these rights that I have recited for you?"

A private person ordinarily has no duty to advise a suspect of his/her Miranda rights unless the citizen is acting as the agent of law enforcement officials and/or there is complicity with law enforcement with respect to the questioning. In this case, the store manager was not acting as an agent of law enforcement officials. As such, he was not required to inform the suspect of her Miranda rights.

In **People v. Lee (1984) 157 Cal.App.3d Supp. 9**, a security officer in a retail clothing store witnessed a suspect remove several articles of clothing from their hangers and place them under other articles of clothing which remained on their hangers. The security guard then witnessed the suspect proceed into the fitting room area with three items on hangers, with two items underneath.

The security officer waited and observed the suspect exit the fitting room and return the three items on hangers to the clothing rack. The security officer went to the fitting room, but the two other items were not there. The security officer detained the suspect after she exited the store. The security officer took the suspect back into a store office and asked if she (the security officer) could recover the items from the suspect's purse. The suspect initially said "No," but thereafter removed the two items herself and handed them to the security officer.

The suspect argued to the court that the arrest was unlawful and, as such, her subsequent consent to be searched was invalid. The court disagreed. A private citizen may make an arrest for a public offense which occurs in that person's presence. There was no question that an offense occurred. The only

question, then, was whether it occurred in the security officer's presence.

The issue of whether an offense occurs in someone's presence is liberally construed. Physical proximity to the offense is not required. In fact, the private citizen need not even see the offense occur. The private citizen may arrest a suspect when circumstances exist which would cause a reasonable person to believe that a crime has been committed in his presence. As such,

even though the suspect was behind a fitting room door when she concealed the merchandise in her purse, the offense was still deemed to have occurred in the security officer's presence. The court also found that

the security officer had the right to detain the suspect without arresting her. A merchant (or security officer) has the right to detain a person whom the merchant has reasonable cause to believe has shoplifted from him. He may also request that the suspect voluntarily surrender the merchandise taken. If refused, the merchant may make a limited search of packages, shopping bags, etc.

Evidence

What Evidence do you need to support the crime or civil action for which an arrest is made?

Good solid evidence to support a criminal conviction is usually nothing more than oral testimony given at trial. As a tip, you can help the prosecution and your attorneys by documenting all of your observations, as well as your perceptions, actions and rationale.

If the suspect is charged with a criminal offense and brought to trial, the prosecution will be required to prove the suspect's guilt "beyond a reasonable doubt." Proof that is "beyond a reasonable doubt" is defined as follows:

"It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (Penal Code §1096.)

Regardless of whether or not the suspect is charged with a criminal offense, the victim may elect to pursue civil charges against the suspect. For example, the owner of a store may pursue a civil action against a suspect to be compensated for the value of items the suspect stole from the store.

In a civil action, the allegations against the suspect must be proven by a preponderance of the evidence. "Preponderance of evidence" means evidence that has more convincing force than that opposed to it. In other words, the plaintiff would have to establish that it is more likely than not that the suspect committed the crime for which he has been accused. However, if the evidence is so balanced that one cannot determine one way or another if the allegations against the suspect are true, then the plaintiff has failed to establish his burden of proof and the suspect will be found not liable.

The "beyond a reasonable doubt" burden of proof is clearly a higher standard than that of "preponderance of the evidence." More convincing evidence is required to establish proof "beyond a reasonable doubt" than that which is

required to establish proof by a “preponderance of the evidence.” However, as a security officer, you will have no way of knowing when a crime is occurring, whether the perpetrator of that crime will face criminal charges, civil claims, both, or neither. As such, you should observe as much as possible and as closely as possible in order to obtain as much evidence against the suspect as you can. The following categories describe some of the different types of evidence that may be used against a suspect in a later proceeding.

Statements by the Defendant

The Fifth Amendment of the United States Constitution provides all persons with the privilege against self-incrimination. In practical terms, this means that persons accused of crimes cannot be forced to respond to questioning and/or testify against themselves.

In order to guarantee that the privilege against self-incrimination is upheld, the United States Supreme Court established what is now generally known as the Miranda Rule or Miranda Warnings. Before undergoing custodial interrogation by a law enforcement officer, the suspect must be informed of his rights, including the right to remain silent and the right to an attorney. The suspect is also to be informed that anything the suspect does say can be used against him in Court. Furthermore, the suspect is to be advised that if he cannot afford an attorney, one will be provided to him. The Miranda Warnings are so named because the United States Supreme Court established these rules in the case of *Miranda v. Arizona* (1966) 384 U.S. 436. The Miranda Rule generally precludes the use of statements from the suspect that result from custodial (i.e., police) interrogation unless the proper procedural safeguards have been complied with. This means that the following statements may be used against the suspect in Court: (1) statements made by the suspect that are not made during custodial interrogation, and (2) statements made by the suspect during custodial interrogation provided that the suspect has been made aware of his rights.

Statements made by a suspect are often extremely useful in proving that the suspect has committed a crime. For example, a suspect may make an admission of guilt in an attempt to obtain leniency, only to deny making such

a statement when he is later charged with a crime. Additionally, under questioning, a suspect may make contradictory statements. Contradictory statements can be used to establish that the suspect is prone to telling lies. If the suspect is proven to be a liar at trial, then he will not be believed if he denies committing the crime.

Due to the importance of a suspect's statements, the security officer should try to write down any statements he/ she hears the suspect make. The security officer should do his best to write down those statements in a report as accurately as possible. The security officer may wish to refresh his/ her memory at a later date regarding what statements the suspect made.

LESSON: Whenever possible, try to document the exact words used. Oral statements made by a person outside of the courtroom are often considered hearsay, and are thus not admissible. However, a statement by a party that amounts to an "admission," – a statement against his interest – is considered non-hearsay. It is fully admissible!

Thus, getting the exact wording is important to determine the admissibility. Write it down as soon as you have a reasonable opportunity to do so while it is fresh in your mind.

Observations By The Security Officer

In some cases, the only evidence that exists to prove that a suspect has engaged in criminal activity are the observations made by the security officer. For example, if you are working in a department store, you may be the only one who sees the suspect attempt to shoplift an item by placing it into her purse. Or, if you are working the graveyard shift at an apartment building, you may be the only one present when you discover that an entrance to the building has been compromised.

For this reason, it is extremely important for the security officer to be as observant as possible when he/ she believe that a criminal activity is occurring. It is also important for the security officer to have a sharp memory with regards to what was observed.

Your observations may be instrumental in law enforcement's decision to press charges against the suspect. Additionally, your observations will be very important in ensuring that a proper record is made regarding the basis for

your detention and/or arrest of the suspect.

As noted above, the Shopkeeper's Privilege permits a security officer to temporarily detain a suspected shoplifter if the security officer has probable cause to believe the suspect is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises. Additionally, a security officer may make a citizen's arrest if (1) the suspect has committed (or attempted) any public offense in the arresting person's presence, (2) the suspect has committed a felony, even if the felony was not committed in the arresting person's presence, or (3) when a felony has been committed, and the arresting person has reasonable cause to believe that the person arrested is the one who committed that felony.

In some instances, only the suspect and the security officer will be present when the suspect is either detained or arrested. The suspect may fabricate a story at a later date in order to make it seem that the detention or arrest were unlawful. For this reason, your observations and memory will be crucial in proving that the detention and/or arrest were performed lawfully.

Most importantly, as soon as the security officer is able to do so, all relevant observations should be included in the Incident Report. The longer the security officer waits before preparing the report, the more likely it is that details will be forgotten. Preparing a detailed description of your observations in the report will be extremely important in assisting law enforcement in their decision to arrest and/or press charges, and will also assist your employer or client in deciding whether or not to file a civil complaint against the suspect. We can't emphasize enough that you can never have too much detail. Write down the Who, What, Where, When, Why and How. Get all witnesses' accounts, or at least their contact information.

Physical Evidence

Physical evidence is a broad category which encompasses any physical item that may be useful in proving the prosecution's case against a suspect. Physical evidence may include an item which the suspect attempted to steal, videotapes from a surveillance camera, a personal item belonging to the suspect that the suspect left at the scene, a signed statement by the suspect, etc.

If a crime has occurred, and there are no witnesses, the prosecution's case might be based entirely upon physical evidence. It is important to remember that all physical evidence must be treated with the utmost care so that such evidence is not lost, altered, or damaged in any way.

If criminal charges are brought against a suspect, but the physical evidence the prosecution intends to use against the suspect has been altered or damaged, the defense attorney may be able to exclude that evidence from trial.

If you have any physical evidence, be sure to properly preserve it and account for it. Have a proper chain of custody within your organization so no one can allege that the evidence was different property than the one that is the subject of the incident. Photographs taken at the time of the incident are especially helpful to the attorneys.

Witness Statements

Statements from other witnesses are very important. In many cases, you will not be the first person to notice a suspect's criminal activity. It is crucial that you listen to the statements of witnesses and investigate when notified of potential criminal activity.

Additionally, much like statements from a suspect, it is important for a security officer to write down all witness statements as accurately as possible. Witness statements will assist in the investigation of criminal activity and will also assist law enforcement in determining whether to make an arrest and/or bring criminal charges against a suspect.

When taking down witness statements, make sure to obtain contact information from that witness so that law enforcement officials are able to contact that person (if necessary) at a later date. While it is important for you to write down witness statements, those written statements are considered hearsay and the prosecution will not be able to use them at trial should criminal charges be brought against the suspect. However, if you obtain accurate contact information from those witnesses, then they can be called to testify at trial against the suspect.

As previously noted, statements made by a person outside of the courtroom are considered hearsay and are generally not admissible as evidence. So why

bother to take down witness statements? It is to keep the witnesses honest! If they testify differently from the statement they gave to you, then (and only then) you can take the witness stand yourself and testify as to what the witness told you immediately following the incident.

This is called "impeachment of a witness." So the prior statement, even though technically "hearsay," is still allowed in court to show that the witness was inconsistent with his or her own previous statements. Jurors and judges are allowed to consider such inconsistencies in determining the credibility of a witness.

Thus, it is very important that you obtain the statements either directly from the witness' own writing, or if you are going to write down what was said, try to do it as soon as possible after the witness made the statement so it is still fresh in your mind. Also, try to use the witness' own words, whenever possible.

(Capturing witness statements is covered in the training module discussing report writing. It is important for you to know, however, just how such documentation plays out in the courtroom.)

However, it is important to remember that only statements that are voluntarily given are admissible. A coerced statement, whether by physical force or psychological coercion, lacks credibility. This is the basis behind the Miranda Warnings, and the reason why we do not allow such statements into evidence at trial.

Final Comment

You should be congratulated over the fact that you have chosen to learn in more detail the complex issues involving arrest, search and seizure in California. By knowing this area of the law, you will be a more effective security officer. It is our hope that you obtained at least a couple of “golden nuggets” from this Advanced Module, and will be able to apply its concepts immediately in your profession as a licensed security officer.

We want the criminals to be punished without getting away with crime. Importantly, we also want to be sure that you and your security company will be protected from any type of civil liability.

The laws are complex, deriving from both statutes and case law handed down by the appellate courts. They are all intended to ensure that the Fourth Amendment is properly followed. By understanding the subtleties of these laws, you have taken a big step toward ensuring that our protections will be honored, while at the same time be able to help apply justice in a lawful manner.