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Notice Of Cause Of Arrest - Sharpe v. State

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Notice Of Cause Of Arrest

Sharpe v. State[1]

The defendant was stopped in his car by two police officers and asked to show his driver's license. He produced the license in a plastic card-holder, but, using profanity, refused their demand to remove it from the holder. One officer thereupon told the defendant that he was under arrest for disorderly conduct. The defendant jumped from his car and began to walk away. The officer grabbed his coat, a scuffle

1. 231 Md. 401, 190 A.2d 628, *cert. denied*, 375 U.S. 946 (1963), *habeas corpus denied*, 225 F. Supp. 738 (D. Md. 1964).

ensued, and defendant was taken into custody. He was charged with disorderly conduct and assaulting a police officer and was convicted of both in the Municipal Court of Baltimore City. On appeal to the Criminal Court of Baltimore, he was tried without a jury and again found guilty on both counts. On further appeal to the Court of Appeals he argued that there was no evidence of disorderly conduct on which the arrest could have been based. Therefore, he contended, the arrest was illegal, he had the right to resist, and he could not be guilty of assaulting a police officer, inasmuch as the officer was attempting an unlawful arrest at the time of the assault.

In affirming the conviction for *assault*, the Maryland Court of Appeals, in a 4-3 decision, recognized that the conviction depended on the legality of the arrest. Judge Henderson, for the majority, found that the officers could have properly arrested the defendant for failure to comply with the request to take the license out of the holder, and this finding precluded a consideration of the legality of the arrest for disorderly conduct.[2] The majority felt that the fact that the defendant was not charged with non-compliance was immaterial.[3] The court thereupon held that the arrest was legal and the defendant was not justified in resisting. The dissenting judges took issue with the majority's justification of the arrest for non-compliance, contending that the salient question was the legality of the arrest for disorderly conduct. The dissenters then went on to find that no evidence of disorderly conduct on the part of the defendant was shown.[4] Therefore, since the officers had no cause to arrest the defendant for disorderly conduct the arrest was illegal, and the defendant was justified in using any reasonable means, including force, to resist.

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2. The court noted that only the assault conviction was before it, citing MD. CODE ANN. art. 5, § 12A (Supp. 1962):

"A defendant in a criminal action may appeal to the Court of Appeals from a conviction or sentence imposed by the Criminal Court of Baltimore in the proper exercise of its jurisdiction on appeal from the Municipal Court of Baltimore City only in the following cases: . . . (2) Where the sentence of the Municipal Court of Baltimore City was imprisonment only and the sentence of the Criminal Court of Baltimore on appeal therefrom is *imprisonment for a greater term, or imprisonment for the same term and a fine; . . . .*" (Emphasis added.)

In the Municipal Court of Baltimore City the defendant was sentenced to thirty days in jail for disorderly conduct and sixty days for assault, the sentences to run concurrently. On appeal to the Criminal Court of Baltimore he was again found guilty on both counts and sentenced to thirty days for the first and six months for the second offense, to run concurrently. *Ibid.* Sharpe v. State, p. 402. Since the sentence imposed for disorderly conduct by the Criminal Court was the same as that imposed by the Municipal Court, the disorderly conduct conviction could not be reviewed by the Court of Appeals.

3. The court cited as authority for this proposition Price v. State, 227 Md. 28, 175 A.2d 11 (1961), in which, though the defendant was arrested on suspicion of burglary, he was indicted on another offense. In citing *Price* the court confused the charge made at the time of arrest, on which the arrest should be justified, with the charge made in the indictment. However, in that case the officers had probable cause to arrest on suspicion of burglary, and therefore, the arrest on the charge was legal. After the arrest the burglary charge was dropped and the defendant was indicted on a different charge. It was indeed proper to hold that the arrest was legal even though the defendant was not later indicted on the charge made at the time of arrest. This is not the case in *Sharpe*.

4. In Maryland the gist of the offense of disorderly conduct is "the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area." Drews v. State, 224 Md. 186, 192, 167 A.2d 341, 343 (1961).

The critical issue in this case, though voiced by neither majority nor minority, was whether an arrest could be justified on a ground not assigned at the time of the arrest. Although the arrest was ultimately justified for failure to remove the license, it appears from the facts given that the officer intended to arrest only for disorderly conduct, and the charge of failure to comply probably did not even occur to him, if indeed he was aware that there was such an offense.[5] The defendant was given notice of arrest on a specific charge, and he resisted the arrest made on that charge. If he resisted *in reliance* on the specified charge, the court's holding means that his reliance was unjustified.

Today it is black letter law that an officer arresting without a warrant must inform the arrestee of (1) his authority to arrest, (2) his intention to arrest, and (3) the cause for the arrest.[6] In states where the duty has been legislatively imposed,[7] the statutes indicate that notice is required to be given before or at the time of the arrest.[8] On the other hand several cases have held that notice may follow the arrest.[9] Only substantial compliance is demanded,[10] and no particular form of words is required.[11] All that is necessary is that the arrestee be given such sufficient notice that he has the opportunity to submit in an orderly and peaceable manner. However, notice is not necessary where good reason appears for the omission of the notice.[12] Thus, if the person arrested knows the reason for his arrest,[13] such as where

5. The court reasoned that under Art. 66½, § 97 of the MD. CODE ANN., the defendant was required to show his license upon demand of a uniformed officer. The court further noted that the request that the card be removed from the holder was not unreasonable, and a refusal to obey a proper order of an officer may constitute an offense justifying an arrest. The fact that before neither the magistrate, the criminal court, nor the Court of Appeals was this rationale submitted by the State suggests the likelihood that the State's best legal officers were unaware of the existence of such an offense. In fact, the only alternative offered by the State on appeal to justify the arrest was that the defendant had backed his car from an alley, without stopping, into the path of the police car, and had thus committed a misdemeanor in the presence of the officers. The court apparently rejected this argument as lacking in merit and adopted its own theory. See Brief of Appellee, and Appellant's Motion for Re-Argument.

6. 1 ALEXANDER, THE LAW OF ARREST § 93 (1949); 4 WHARTON, CRIMINAL LAW AND PROCEDURE § 1616 (Anderson ed. 1957); 6 C.J.S. *Arrest* § 6e (1937).

7. See ALI CODE OF CRIMINAL PROCEDURE § 25, comment at 248 (1930), for a listing of the states and statutes.

8. The ALI divides the statutes into several general types. See ALI, *op. cit. supra* note 7, at 248. I. "*When arresting* a person without a warrant, the officer must inform him of his authority and the cause of the arrest. . . ." *Ibid.* II. "The person making the arrest must inform the person *to be arrested* of the intention to arrest him, of the cause of the arrest, and the authority to make it. . . ." (Emphasis added.) Here, the wording "to be arrested" indicates that notice must definitely come *before* the arrest.

9. Bourne v. Richardson, 133 Va. 441, 113 S.E. 893, 899 (1922); Commonwealth v. Cooley, 72 Mass. 350, 356 (1856); Hinton v. Sims, 171 Miss. 741, 158 So. 141, 143 (1934); State v. Malnati, 109 Vt. 429, 199 Atl. 249, 250 (1938); State v. Taylor, 70 Vt. 1, 39 Atl. 447, 449 (1896); Ward v. Green, 11 Conn. 455, 459 (1836).

10. People v. Jaurequi, 142 Cal. App. 2d 722, 298 P.2d 896, 901 (1956); State v. Frink, 120 N.W.2d 432, 437 (Iowa 1963); Nickell v. Commonwealth, Ct. App. Ky., 285 S.W.2d 495 (Ky. 1956).

11. State v. Phillips, 118 Iowa 660, 92 N.W. 876, 883 (1902).

12. *Ibid.* See also RESTATEMENT, TORTS § 128 (1934), which states that an officer must give a notice of cause of arrest unless the arrestee, knowing the arrestor to be an officer, does not request it, *except* where the officer reasonably believes it would be dangerous, would imperil the making of the arrest, or would be useless or unnecessary.

13. Minton v. State, 198 Ark. 875, 131 S.W.2d 948, 950 (1939); Dale v. Commonwealth, 186 Ky. 510, 217 S.W. 363, 364 (1920); State v. Swanson, 119 Ore. 522, 250 Pac. 216, 217 (1926).

he has just admitted the commission of an offense,[14] is in the process of committing the offense, or has just committed the offense in the presence of the officer,[15] notice of cause of arrest is not necessary. Nor is it necessary where there is no reasonable opportunity to give notice,[16] or where it would be impractical or futile,[17] such as where the arrestee is fleeing,[18] or actively resisting.[19] The existing law thus emphasizes the right of an arrested person to know the basis for his arrest in order to determine whether he should submit or whether he may properly resist.[20] Lesser emphasis is placed on the convenience of the arrestor.

The purpose of the requirement of notice of authority and cause is to protect personal liberty from unlawful interference.[21] A person is privileged to defend himself with reasonable force, if necessary, to preserve this liberty.[22] However, resistance to an arrest is an act done at the peril of the arrestee.[23] His right is determined in absolutes — if the arrest is unlawful, his right to resist is established, but if the arrest is lawful, there is no right to resist whatsoever.[24] Even a reasonable belief in the illegality of the arrest is no defense to a charge

14. People v. Rios, 46 Cal. App. 2d 297, 294 P.2d 39, 41 (1956).

15. Minton v. State, 198 Ark. 875, 131 S.W.2d 948, 950 (1939); Anderson v. Foster, 73 Idaho 340, 252 P.2d 199, 202 (1953); Heinzman v. State, 45 Okla. Crim. 305, 283 Pac. 264 (1929).

16. Nickell v. Commonwealth, 285 S.W.2d 495, 496 (Ky. 1956); Love v. Bass, 145 Tenn. 522, 238 S.W. 94, 95 (1922).

17. State v. Frink, 120 N.W.2d 432, 437 (Iowa 1963); Nickell v. Commonwealth, *supra* note 16, at 496.

18. State v. Phillips, 118 Iowa 660, 92 N.W. 876, 884 (1902); Commonwealth v. Negri, 414 Pa. 21, 198 A.2d 595, 601 (1964); Smith v. Drew, 175 Wash. 11, 26 P.2d 1040, 1044 (1933).

19. State v. Phillips, *supra* note 18, at 884.

20. Wolf v. State, 19 Ohio St. 248, 259 (1869).

21. Johnson v. State, 19 Ala. App. 141, 95 So. 583, 585 (1923).

22. United States v. Angelet, 231 F.2d 190, 193 (2d Cir. 1956); People v. Dreares, 15 App. Div. 2d 204, 221 N.Y.S.2d 819, 821 (1961); Roberson v. State, 43 Fla. 156, 29 So. 535, 538 (1901); State v. Robertson, 191 S.C. 509, 5 S.E. 2d 285 (1939); State v. Robinson, 145 Me. 77, 72 A.2d 260, 262 (1950); Sugarman v. State, 173 Md. 52, 57, 195 Atl. 324, 326 (1937). There is, however, a qualification to this right. That the arrestee was unlawfully arrested does not justify him in taking a life in resisting, unless in self-defense. State v. Anselmo, 46 Utah 137, 148 Pac. 1071, 1076 (1915); State v. Cates, 97 Mont. 173, 33 P.2d 578, 587 (1934); Coats v. State, 101 Ark. 51, 141 S.W. 197, 201 (1911); Davis v. State, 53 Okla. Crim. 411, 12 P.2d 555, 557 (1932). Nor is mere temporary detention such an invasion as to justify doing serious injury, or use of a deadly weapon, unless in self-defense. State v. Rousseau, 40 Wash. 2d 92, 241 P.2d 447, 449 (1952).

23. Although no cases are found which expressly state this, it is strongly implied in all the cases, which usually say simply, "The arrest being illegal, the defendant was justified in resisting." See the instant case at 406. There was no consideration of whether the defendant resisted because of or in spite of the possible illegality of the arrest. See also MORELAND, MODERN CRIMINAL PROCEDURE 41 (1959). "There is no right to resist a lawful arrest made in a lawful manner. . . . The fact that the arrestee is mistaken as to either the law or the facts as to the legality of the arrest will not avail him. It is the policy of the law to protect one who is executing lawful process in a lawful manner and consequently it is considered unwise to protect one who is resisting such process, even though his resistance is supported by a reasonable belief that the service is illegal." In essence this "act at your own peril" theory makes resistance to a legal arrest a *malum prohibitum* offense, although not of a statutory origin. See note 41 *infra*.

24. Smith v. State, 84 Ga. App. 79, 65 S.E.2d 709, 711 (1951).

of assault arising out of the resistance.[25] Under such a rule it is necessary for the arrestee, in deciding whether to resist, to know, at the minimum, the ground on which the arrest is based.[26] Since the cause for the arrest is perhaps the single most important factor in determining the legality of the arrest, a rule which would permit an arrest to be made without the necessity of informing the defendant of the cause would render the right to resist illusory.

In *Leachinsky v. Christie*,[27] which may one day become "one of the pillars of English liberty"[28] the Court of Appeals and House of Lords wrote well-reasoned and analytical opinions on the requirement of notice of cause. In an action for false imprisonment the plaintiff showed that he had been arrested without a warrant by the defendant, a police officer, on the stated ground of commission of a misdemeanor, although the officer admitted that the real reason for the arrest was that he suspected the plaintiff of having committed a felony.[29] The parties conceded that the misdemeanor charge was unfounded, but that there were reasonable grounds to have arrested the plaintiff for

25. Love v. State, 15 Okla. Crim. 429, 177 Pac. 387, 388 (1919); see also MORELAND, *op. cit. supra* note 23, at 41.

26. Under the "resistance-to-arrest-is-a-*malum-prohibitum*-offense" analogy, resistance to a lawful arrest, under an innocent and non-negligent mistake of fact, will not be excused even if the mistake was of such a nature that what was done would have been unpunishable *and entirely proper*, had the facts been as they were reasonably supposed to be. See PERKINS, CRIMINAL LAW 699 (1957). Because of this mistake of fact doctrine it is essential for the arrestee to know why he is being arrested in order to determine whether he can properly resist. See also Perkins, *The Law of Arrest*, 25 IOWA L. REV. 200, 248 (1940).

27. 2 All E.R. 395 (C.A. 1945), *aff'd*, 1 All E.R. 567 (H.L. 1947).

28. Note, *Arrest — Without Warrant*, 63 SCOT. L. REV. 205 (1947).

29. The rule in false arrest cases is that a person arresting on one ground, upon which it subsequently develops it cannot be sustained, cannot, when sued for false imprisonment, justify on the theory that another ground existed at the time of the arrest and for which, under the circumstances, the arrest would have been legal, or because reasonable ground existed for an arrest for such other unassigned offense. 22 Am. Jur. *False Imprisonment* § 84 (1939); 35 C.J.S. *False Imprisonment* § 35 (1960); 64 A.L.R. 653 (1929). The importance of the statement of cause at the time of arrest, therefore, becomes apparent. The rights of the parties become fixed at the time of the arrest and are based on the cause assigned at the time of arrest, and charges based on afterthoughts and facts subsequently ascertained are of no avail to the person who gives a wrong statement of cause at the time of arrest. Cunningham v. Baker, 104 Ala. 160, 16 So. 68, 71 (1894); Donovan v. Guy, 347 Mich. 457, 80 N.W.2d 190 (1956); McNeff v. Heider, 216 Ore. 583, 337 P.2d 819, 823 (1959); Noe v. Meadows, 229 Ky. 53, 16 S.W.2d 505, 508, 64 A.L.R. 648 (1929); Snead v. Bennoil, 166 N.Y. 325, 59 N.E. 899, 900 (1901). In his suit against the arrestor the plaintiff need go no farther in anticipation of defenses than to negative the ground given by the defendant as the basis of his arrest of the plaintiff. Hogg v. Lorenz, 234 Ky. 751, 29 S.W.2d 17, 19 (1930). However, an arrest based on more than one ground can be justified if at least one of those grounds is valid, the other improperly made charges not in themselves vitiating the arrest. Noe v. Meadows, *supra*; Hogg v. Lorenz, *supra*. The only effect the charge which might have been made, but which was not made, has in an action for false imprisonment is to mitigate the damages. Lyons v. Worley, 152 Okla. 57, 4 P.2d 3 (1931); Geldon v. Finnegan, 213 Wis. 539, 252 N.W. 369, 373 (1934).

The Maryland court has not yet had occasion to either adopt or reject the rules governing false imprisonment defenses. Query whether in light of the *Sharpe* decision permitting the arrest to be justified on a cause not stated at the time of arrest, Maryland would allow the arrestor defending against a false imprisonment charge to justify the arrest in the same manner as he is permitted to do in the criminal cases — by bringing forth reasons for the arrest which were not assigned at the time of the arrest?

the felony. The Court of Appeals held that an arrest could only be made on a specific ground stated at the time of the arrest.[30] "The law does not allow an arrest *in vacuo*, or without reason assigned", and the reason assigned must be the self-same reason as is the justification for the arrest.[31] The House of Lords elaborated on the policy consideration behind the law. Placing a high value on the right to resist an illegal arrest, the House held that such right could not be reconciled with the proposition that a person can be arrested without knowing *why* he is arrested.[32] If the officer has a lawful reason to deprive one of his liberty he must tell the arrestee what the reason is, for, unless he be told, he cannot be expected to submit to the arrest or be blamed for resisting.[33] Furthermore, the House stated, the offense charged must be the offense upon which the arrest was justified. No man could safely defend his liberty if some other ground for the arrest, which the officer had not disclosed, could subsequently be brought forward to justify the arrest.[34] This language is echoed in the two leading American cases dealing with notice of cause.[35]

Standing diametrically opposed to this law which may become the "pillar of English liberty", is the Uniform Arrest Act, which was expected to bring the law of arrest in line with modern day police practice and needs.[36] The Uniform Arrest Act provides that if a lawful cause for arrest exists the arrest is lawful even though the arresting officer charges the wrong offense or gives a reason that does not justify the arrest.[37] This provision of course makes any notice of cause of arrest given to the arrestee valueless in determining his right to resist. This problem was avoided by including a provision denying the citizen the right to resist any arrest made by a uniformed officer.[38]

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30. Leachinsky v. Christie, 2 All E.R. 395, 404 (C.A. 1945).
31. *Ibid.*
32. Christie v. Leachinsky, 1 All E.R. 567, 575 (H.L. 1947).
33. 1 All E.R. at 578.
34. 1 All E.R. at 560.
35. An officer must arrest for some specified cause and then justify for that cause, Snead v. Bonnoil, 166 N.Y. 325, 59 N.E. 899 (1901), and if no cause, or insufficient cause appears the arrestee takes his measures at the time of the arrest, and he must judge accordingly from the information given. People v. Marendi, 213 N.Y. 600, 107 N.E. 1058, 1060 (1915), citing Howard v. Gosset, L.R., 10 Q.B. 359 (1845).
36. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942):
> "The law of arrest by peace officers illustrates the discrepancy between law in the books and the law in action. The former not only antedates the modern police department, but was developed largely during a period when most arrests were made by private citizens, when bail for felonies was usually unattainable, and when years might pass before the royal judges arrived for a jail delivery. Further, conditions in the English jails were then such that a prisoner had an excellent chance of dying of disease before trial. Today, with few exceptions, arrests are made by police officers, not civilians. Typically, they are made without a warrant by officers in patrol cars, often in response to requests coming over the police radio, sometimes from distant cities. When a citizen is arrested, his probable fate is neither bail nor jail, but release after a short detention in a police station. As a result of the antiquated law on the books, today the great majority of arrests by police officers are illegal in their inception, continuance, or termination. This illegality is hardly the fault of the police, for they cannot fulfill both their duty to obey the law and their duty to protect the community."

37. *Id.* § 7, at 346.
38. *Id.* § 5, at 345. "If a person has reasonable ground to believe that he is being arrested by a police officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest."

However, it should be noted that the act has been adopted by only three states.[39] Apparently the legislatures are in no hurry to abolish the right to resist an illegal arrest.

Perhaps the law of arrest is antiquated, unfit for modern use, and undermines the effectiveness of the police in protecting both the community and themselves. Perhaps there is also some justification for abolishing the citizen's right to resist a uniformed officer making an illegal arrest.[40] However the Maryland court has not been concerned with the problem, at least in a forthright manner. It has continued unanalytically to recognize the right, while taking a long stride toward emasculating it by deciding that the legality of the arrest is not necessarily to be determined by the cause stated at the time of arrest. By what temerity must the arrestee now act to resist an arrest on a charge of murder, for which he knows there is no probable cause, if the arrest may be found valid because he actually had negligently and unwittingly gone fifty-six m.p.h. in a fifty-five m.p.h. zone and in the presence of the arresting officer?[41] Conceding arguendo that the right to resist may no

39. DEL. CODE ANN. tit. 11, § 1905 (1953); N.H. REV. STAT. ANN. ch. 594, § 5, 1955; R.I. GEN. LAWS § 12-7-10 (1956).

40. See Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 330 (1941): "Though at one time the innocent may have been as likely to resist illegal arrest as the guilty, this is no longer true. An innocent man will not kill to avoid a few hours, or at the most several days, in jail. Besides, he will ordinarily have no gun, and therefore will be unable to resist successfully.

"Thus the right to resist illegal arrest by a peace officer is a right that can be exercised effectively only by the gun-toting hoodlum or gangster. What he fears is not an illegal arrest, but a legal one, since a legal arrest is based on reasonable belief in his guilt and hence likely to result in a prison sentence. Therefore consciousness of guilt is likely to lead such a person to resist any arrest, and leave the problem of legality of the arrest to his lawyer only when resistance is unsuccessful.

"Since the right to resist an illegal arrest by a peace officer can be exercised only by the enemies of society, it should not exist under modern conditions."

See also MODEL PENAL CODE § 3.04(2)(a)(1) (Proposed Official Draft), which proposes that the use of force to resist a known peace officer making an illegal arrest should not be permitted. "It should be possible to provide adequate remedies against illegal arrest, without permitting the arrested person to resort to force — a course of action highly likely to result in greater injury even to himself than the detention." MODEL PENAL CODE 19, Comment (Tent. Draft No. 8, 1958).

41. See for example Squadrito v. Griebsch, 1 N.Y.2d 471, 136 N.E.2d 504 (1956), a false imprisonment action. The plaintiff was stopped by the defendant, an officer, for going 70 mph. Asked, "What did I do wrong?", the officer replied, "Just follow me to the judge." The plaintiff sued for false arrest on the basis of lack of notice of cause. The court held that the arrest was legal, and notice of cause was not necessary because the offense was committed in the presence of the officer. The court noted that both a proper regard for the sensibilities of the public and as a matter of public relations the arrestee should be advised of the cause of the arrest. However, this was to be a matter of police administration since the statute did not require notice when the offense was committed in the presence of the officer. It was a reasonable and necessary assumption that the offender caught in the act is fully aware of what he is doing and why he is taken into custody.

However, the numerical growth of the *malum prohibitum* offenses, (see Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933)), which are characterized by the lack of need for mens rea in committing the offense, would seem to increase the importance of notice of cause of arrest. To be guilty of the offense one need not know he is committing the offense, and it is predictable that in a large percentage of the cases the offender is in fact unaware of his offense. In such cases the rule eliminating the requirement of notice when the offense is committed in the presence of the officer loses its rationale, since it is based on the supposition of awareness as made

longer be a healthy or necessary right, query whether the Maryland Court is approaching its destruction in a fair and direct manner.

In *Sharpe* the arrest was ultimately justified on the basis of a misdemeanor committed in the presence of the officer,[42] even though it appeared that the officer, knowing all the facts, did not know that those facts actually constituted an offense, and relied on some other basis for his arrest. It would appear that the court applied the presumption that when one is arrested in the actual commission of an offense in an officer's presence, the arrest is based on that offense.[43] As applied, this presumption was sufficiently strong to overcome any misleading statements of the officer to the contrary, and in essence amounted to an irrebutable presumption that the officer, assuming he was aware of all the facts, based his arrest on the proper ground. However, actual reliance on these facts in making the arrest was not necessary. This rule, which discourages reliance on the statements of officers, and permits them to become less careful in basing their arrest on proper causes, may show itself to be an insidious encroachment not only on the right to resist an illegal arrest, but also on the most important concept in the law of arrest — probable cause.

An officer may arrest without a warrant where there was probable cause to believe at the time of arrest that a felony has been committed and the person arrested has committed it.[44] Probable cause exists where the facts within the officer's knowledge are sufficient to warrant a man of reasonable caution in the belief that the offense has been committed.[45] Where the offense is committed in the officer's presence, however, the law does not state the need for probable cause. The definitions of the two are so similar that where "in the presence" is satisfied,[46] "probable cause" should also be satisfied. Carrying the *Sharpe* case one step further, suppose all the facts of which the officer was conscious

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in the *Squadrito* case. Since in the *malum prohibitum* offenses it is expected that the offender will frequently not know that he is committing an offense it should be imperative that notice of cause be given. In the eyes of an arrestee who knows of no wrong which he has committed, an unexplained arrest may be an unjustifiable arrest and therefore grounds for indignant resistance. It would be in the interests of both the arrestor and the arrestee to require that notice of cause be given in situations where there is a strong likelihood that the arrestee does not understand why he is arrested. Presumptions of knowledge, on which the statutes are based, should be clearly inapplicable in these situations.

42. An offense takes place in the presence of an officer *when his senses afford him knowledge that an offense is being committed.* Stanley v. State, 230 Md. 188, 191, 186 A.2d 478, 480 (1962); Allen v. State, 229 Md. 253, 182 A.2d 832 (1962); Robinson v. State, 200 Md. 128, 78 A.2d 310 (1952); 4 WHARTON, CRIMINAL LAW AND PROCEDURE § 1599 (Anderson ed. 1957); 6 C.J.S. *Arrest* § 5(b) (1937). In the instant case the officer, although he knew all the facts, apparently did not know that those facts actually constituted an offense. Since he did not know the offense on which the court based its decision was being committed, therefore, by definition, it was not committed in his presence.

43. Rutledge v. Rowland, 161 Ala. 114, 49 So. 461, 466 (1909).

44. Drouin v. State, 222 Md. 271, 278, 160 A.2d 85, 88 (1960); Mulcahy v. State, 221 Md. 413, 421, 158 A.2d 80, 85 (1960); 6 C.J.S. *Arrest* § 6(d) (1937).

45. Brinegar v. United States, 338 U.S. 160, 175 (1949); Carroll v. United States, 267 U.S. 132, 162 (1925); Lane v. State, 226 Md. 81, 92, 172 A.2d 400, 406 (1961), *cert. denied*, 368 U.S. 993 (1962); Mulcahy v. State, 221 Md. 413, 422, 158 A.2d 80, 85 (1960).

46. Note 42 *supra.*

constituted probable cause for arresting for a felony not committed in his presence, rather than a misdemeanor committed in his presence. Suppose also that the officer was not aware that the facts constituted such probable cause. Under these circumstances he makes the arrest on some other cause, for which it subsequently proves the arrest was unjustified. The crucial question becomes: Where facts constituting probable cause exist, is it necessary for the officer to arrest in reliance thereon, or is it sufficient to justify the arrest on the ground that such probable cause existed, not showing that the officer acted upon the basis of the probable cause?

It would appear that the mere existence of facts constituting probable cause, without the need for reliance thereon, would frustrate the real purpose of the requirement of probable cause — the protection of the citizen from *arbitrary* arrests. Although reasonableness may be determined by a hypothetical man, arbitrariness should be determined in relation to the mind of the arrestor at the time of the arrest.[47] If the court sanctions an arrest, arbitrary in terms of the officer's state of mind, on the ground that facts constituting probable cause existed, then the court is in actuality permitting an arbitrary arrest.

However, the courts do not mean that the mere existence of facts constituting probable cause, without reliance thereon, is sufficient to make an arrest legal. The legality of the arrest does not depend upon the actual state of the case in point of fact,[48] but upon the honest and reasonable belief of the arrestor, expressed by his charge,[49] in the guilt of the arrestee, and the belief must be founded upon circumstances warranting a reasonable man in the belief that the charge made is true.[50] An arrest cannot be justified as having been made on probable cause if the belief is unsupported by the facts,[51] and likewise it should not be justified on the ground that the offense was committed in the officer's presence, when the officer was not aware of the offense and did not rely on it to make his arrest. Under this analysis the *Sharpe* case appears to have been wrongly decided, since the officer seems to have made his arrest in reliance on his belief in the cause for which he gave notice at the time of the arrest, and not in reliance on the fact that the defendant refused to take his license from the plastic card-holder.

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47. Ware v. Garvey, 139 F. Supp. 71, 85 (D. Mass. 1956).

48. Bacon v. Towne, 4 Mass. 217 (1849); Range v. State, 156 S.2d 534, 536 (Fla. 1963); State v. Winne, 21 N.J. Super. 180, 91 A.2d 65, 75 (1952), *rev. on other grounds,* 96 A.2d 63 (1953).

49. Although in some cases failure to make a charge at the time of arrest does not invalidate the arrest, such failure may be taken into consideration in determining probable cause. Stelloh v. Liban, 21 Wis. 2d 119, 124 N.W. 101, 104 (1963).

50. U.S. v. Horton, 86 F. Supp. 92, 96 (W.D. Mich. 1949); People v. Hollins, 173 Cal. App. 2d 88, 343 P.2d 174, 176 (1959); Van Fleet v. West American Ins. Co., 5 Cal. App. 2d 125, 42 P.2d 378 (1935); People v. Dolgin, 415 Ill. 434, 114 N.E.2d 389, 392 (1953).

51. Pamplin v. State, 21 Okla. Crim. 136, 205 Pac. 521, 523 (1922); 6 C.J.S. *Arrest* § 6(d)(1) (1937).