

RESOLUTION 04-03-2015

DIGEST

Misdemeanors - Probable Cause Challenges by Out-of-Custody Defendants

Amends Penal Code section 991 to allow out-of-custody misdemeanor defendants to move for dismissal on ten days' notice.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend California Penal Code section 991 to read as follows:

§991

- 1 (a) ~~If the defendant is in custody at the time he appears before~~ When a defendant appears
- 2 before a ~~the~~ magistrate for arraignment and if the public offense is a misdemeanor to which the
- 3 defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the
- 4 defendant, shall determine whether there is probable cause to believe that a public offense has
- 5 been committed and that the defendant is guilty thereof.
- 6 (b) ~~If the defendant is in custody at the time of arraignment,~~ The determination of
- 7 probable cause shall be made immediately unless the court grants a continuance for good cause
- 8 not to exceed three court days. If the defendant is out of custody at the time of arraignment, the
- 9 determination of probable cause shall be made within ten calendar days of arraignment.
- 10 (c) In determining the existence of probable cause, the magistrate shall consider any
- 11 warrant of arrest with supporting affidavits, and the sworn complaint together with any
- 12 documents or reports incorporated by reference thereto, which, if based on information and
- 13 belief, state the basis for such information, or any other documents of similar reliability.
- 14 (d) If, after examining these documents, the court determines that there exists probable
- 15 cause to believe that the defendant has committed the offense charged in the complaint, it shall
- 16 set the matter for trial. If the court determines that no such probable cause exists, it shall
- 17 dismiss the complaint and discharge the defendant.
- 18 (e) Within 15 days of the dismissal of a complaint pursuant to this section the prosecution
- 19 may refile the complaint. A second dismissal pursuant to this section is a bar to any other
- 20 prosecution for the same offense.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Penal Code § 991 is designed to ensure that defendants do not face prolonged prosecution for baseless charges by granting defendants the right to an early probable cause hearing before a judge. If a neutral judge determines that there is no basis for the charge/s at such a hearing, the prosecution is automatically given an opportunity to re-file the case and provide additional evidence supporting the charges. The problem is that § 991 (unlike §995, its felony sister-statute) restricts the probable cause hearing to cases in which the defendant is in jail at the

time of his arraignment. That means that an innocent misdemeanor defendant who is NOT in jail has no right to a probable cause hearing. Absurdly, under the current version of §991, an innocent defendant may actually be better off in jail at the time of arraignment because he can thereby ask for dismissal of a baseless case.

The Solution: The proposed modification to § 991 would solve the problem by granting out of custody defendants (with appropriate notice to the court and prosecution) the right to a probable cause hearing. The flaws in the current version of § 991 are glaring, especially when one considers that, because §995 (the felony statute) has no requirement that a defendant be in custody, it is easier for a felony defendant (ie one charged with more serious offenses) to seek dismissal of baseless charges than it is for a misdemeanor defendant. For example, a felony defendant charged with assault with a deadly weapon is entitled to a probable cause determination by a judge before trial, whether he is in or out of custody at arraignment. However, a misdemeanor defendant charged with a non-serious case, such as shoplifting, is only eligible for a probable cause determination if he or she is in custody at the time of the arraignment. Because reforming § 991 will afford all misdemeanor defendants the same rights as felony defendants (while simultaneously clearing court dockets of baseless cases), the modification proposed above is long overdue.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

AUTHOR AND/OR PERMANENT CONTACT: Nick Stewart-Oaten

RESPONSIBLE FLOOR DELEGATE: Nick Stewart-Oaten

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 991 to allow out-of-custody misdemeanor defendants to move for dismissal on ten days' notice. This resolution should be disapproved because, even though misdemeanor defendants should be allowed to challenge probable cause, there is no reason that out-of-custody defendants need to have oral motions to dismiss decided on ten days' notice.

The resolution models the right to a probable cause determination on the right of a felony defendants to a probable cause determination under Penal Code section 995, which provides for a probable cause hearing on any felony charge, regardless of the defendant's custodial status. However, section 995 addresses a concern not present in misdemeanor charges. A felony charge

may be brought by the district attorney in an information (the equivalent of a misdemeanor complaint), or by the grand jury in an indictment. Section 995 provides for judicial review of probable cause for all such charges.

Misdemeanors, by contrast, are always brought by means of a complaint drawn up by a prosecutor. Section 991 provides for probable cause hearings not to establish parity with the treatment of felony charges, but to implement the Constitutional requirement of prompt probable cause determinations identified by the United States Supreme Court in *Gerstein v. Pugh* (1975) 420 U.S. 103. The *Gerstein* Court held that in-custody defendants have a Fourth Amendment right to prompt determinations of probable cause for holding them on criminal charges. (*Id.* at pp. 114, 119-120.) This Fourth Amendment concern is not implicated for out-of-custody defendants.

This resolution is related to Resolution 04-05-2015.

COUNTY ARGUMENTS TO RESOLUTION 04-03-2015

SACRAMENTO COUNTY BAR ASSOCIATION

Resolution 04-03-2015 would require the courts to determine if there is probable cause for detaining and charging non-custodial misdemeanor defendants. Under current law, only misdemeanor defendants held in custody are entitled to a probable cause determination. (See PEN §991(a) “If the defendant is in custody at the time he appears before the magistrate for arraignment, and if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate... shall determine whether there is probable cause...”) According to the Appellate Division of the Superior Court for the State of California, County of Los Angeles decision in *People v. McGowan* (filed 3/27/15 BR 051696; Airport Trial Court No. 4WA22795), “The constitutional right to a judicial determination of probable cause following arrest has its roots in *Gerstein v. Pugh* (1975) 420 U.S. 103. In that case, the United States Supreme Court held the Fourth Amendment vests an in-custody defendant with the right to have a prompt postarrest determination of whether there is probable cause to believe he or she committed ‘a crime.’” (*Id.* at pp. 114, 119-120.) According to *McGowan*, “[Penal Code] Section 991 protects a misdemeanant from unconstitutional pretrial confinement when there is no probable cause...” (*McGowan* p. 6) Providing the same protection for misdemeanor defendants not in custody would, per the reasoning in *McGowan*, not make sense because there is no risk of “unconstitutional pretrial confinement” for those defendants.

Practically speaking, probable cause determinations are not made in court hearings for many in-custody misdemeanor defendants. Rather, they are often made at the time of arrest via electronic law enforcement affidavits that are reviewed and signed by judges at all hours of the day and night, including weekends. The result is that, currently, there is little actual in-court time devoted to probable cause determinations for misdemeanor defendants. When the percentage of in-custody misdemeanants is considered (only 10% of misdemeanants are held in custody in

many jurisdictions), Resolution 04-03-2015 would require courts to provide in-court probable cause determinations for the remaining 90% of a county's misdemeanants, an unnecessary and costly burden. For these reasons, the Sacramento County Bar Association recommends Resolution 04-03-2015 be disapproved.