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Opinion No. 01-038

Probable cause determinations by judicial commissioners

QUESTIONS

1. When there has been a warrantless arrest, is a prompt judicial determination of probable cause a prerequisite to an extended detention?
2. What constitutes an extended detention after a warrantless arrest?
3. If a judicial determination of probable cause is required on a warrantless arrest, are the Judicial Commissioners in Hamilton County, Tennessee, vested with the authority, statutorily or otherwise, to make such a determination?
4. If the Judicial Commissioners do not have the requisite authority, would a statute granting such authority be constitutional?

OPINIONS

1. Yes. The federal constitution requires a judicial determination of probable cause as a prerequisite to an extended restraint of liberty following an arrest.
2. An extended detention is one that continues beyond 48 hours absent a bona fide emergency or extraordinary circumstances.
3. Yes.
4. The answer to question three (3) renders a response to question four (4) unnecessary.

ANALYSIS

1. In *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), the United States Supreme Court determined that the Fourth Amendment mandates a prompt judicial determination of probable cause as a prerequisite to any extended restraint of liberty after a warrantless arrest. *Id.* at 125, 95 S. Ct. at 869. To ensure the Fourth Amendment's guarantee that warrants will not be issued except upon probable cause, the existence of probable cause is decided by a detached and neutral magistrate whenever possible. *Id.* at 119, 95 S. Ct. at 862. The Court recognized that a policeman's on-the-scene assessment of probable cause justifies arresting and briefly detaining a person suspected of crime. *Id.* at 114, 95 S. Ct. at 863. The requirement that an after-the-fact determination of probable cause be made promptly is to protect the accused's rights.

2. The United States Supreme Court clarified its *Gerstein* holding by stating that a probable cause determination for persons arrested without a warrant must be made as soon as is reasonably feasible, but in no event later than 48 hours after arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49 (1991). The Court noted that in some cases a delay of less than 48 hours might be too long if the defendant can show that the probable cause determination was delayed unreasonably. *Id.*

3. It is at the initial appearance proceeding prescribed by Tenn. R. Crim. P. 5 that a person arrested without a warrant is afforded a probable cause determination. The judicial officer who conducts the initial appearance proceeding is called a "magistrate" in Rule 5. Tenn. Code Ann. §§ 40-1-106 and 40-5-102(3) clearly state that judicial commissioners are magistrates, as are mayors, county executives, and recorders of cities and towns.

It should also be noted that Tenn. Code Ann. § 40-5-101 defines a magistrate as an officer having power to issue a warrant for the arrest of a person charged with a public offense. Tenn. Code Ann. § 40-5-201(b)(1) specifically authorizes judicial commissioners to issue arrest warrants upon a finding of probable cause.

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