

## Opinion No. 63-123

September 23, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Mr. James L. Dow City Attorney P. O. Box 128 Carlsbad, New Mexico

### QUESTION

#### QUESTIONS

1. May a police magistrate accept a complaint and issue a warrant for the arrest of a person **solely** on the information and belief of the party signing the complaint, regardless of whether such party be an individual, an officer or the city attorney?
2. Is there a conflict in the statutes (§§ 41-1-2 and 38-1-3) as to the issuance of a warrant by a police magistrate when a complaint has been filed?

#### CONCLUSIONS

1. No.
2. No.

### OPINION

#### {\*279} ANALYSIS

We will attempt to answer your questions together, and will also point out initially that in addition to the statutes you mention, Article II, Section 10 of the Constitution must be considered. This Article provides in pertinent part that "The people shall be secure in their persons . . . and no warrant to . . . seize any person . . . shall issue . . . without a written showing of **probable cause**, supported by oath or affirmation." (Emphasis added)

As our Supreme Court has noted, the general purpose of this provision is to secure the preservation of the personal security and liberty of the individual, by forbidding the issuance of a warrant for his arrest except upon probable cause shown under oath, and by preventing as far as possible the institution of baseless and unfounded prosecutions. **State v. Trujillo**, 33 N.M. 370, 266 Pac. 922.

Of the two statutes here involved, Section 41-1-2, N.M.S.A., 1953 Compilation, is the **later** enactment and provides as follows:

"No warrant for the arrest of any person charged with a **misdemeanor** or crime, shall be issued out of **any court** or by any justice of the peace in this state, on the official oath of any prosecuting officer, nor upon the **information and belief only** of any such officer or other person; but in all cases such officer or other person, showing **specific facts within his or their own personal knowledge**, that constitute **probable cause** for the issuance of the same.

"Provided; that such warrants may issue upon affidavits based upon information and belief when such affidavits are approved in writing by the district attorney, or his assistants, in and for the district or county wherein such affidavits are made." (Emphasis added)

Section 38-1-3, N.M.S.A., 1953 Compilation (P.S.), dealing with violations of municipal ordinances, provides that

{\*280} "In all actions for the violation of any ordinance in which an arrest has not been made, a warrant for the arrest of the defendant may issue in the first instance upon the affidavit of **any person** making the complaint that he has **reasonable grounds to believe** the party charged is guilty thereof . . ." (Emphasis added)

Close scrutiny of these statutes and the constitutional provision indicate to us that the following are the key phrases:

"Probable cause" -- Article II, Section 10, Constitution; Section 41-1-2, supra.

"information and belief only" -- Section 41-1-2, supra.

"reasonable grounds to believe" -- Section 38-1-3, supra.

It is a most fundamental rule of statutory interpretation and construction that statutes are to be harmonized if possible. Proceeding in this vein, we find that a number of courts have said that a "reasonable ground for believing" is substantially the same thing as "probable cause." **Small-wood v. Commonwealth**, Ky., 204 S.W. 2d 945; **Walling v. Benson**, 137 F.2d 501; **McKeon v. National Casualty Co.**, 216 Mo. App. 507, 270 S.W. 701; **Owens v. Graetzel**, Md., 132 Atl. 265; **Christ v. McDonald**, 152 Ore. 494, 52 P. 2d 655.

Treating these phrases as substantially synonymous, we then have each of the provisions in question containing the phrase "probable cause." It now becomes necessary to determine whether the prohibition contained in § 41-1-2, supra, against issuing a warrant upon "information and belief **only**" is consistent with the requirement in the same section of "probable cause."

While there is some diversity of opinion on the matter, most courts have not required personal knowledge as an **absolute** prerequisite for "probable cause." However, we must keep in mind the fact that the general rule in these arrest cases requires that the

complainant have **some** personal knowledge, and not base his entire complaint solely on information and belief, or hearsay. **6 C.J.S.**, Arrest, § 50; **Meddaugh v. Williams**, Mich., 12 N. W. 34. This taken in conjunction with the restriction in § 41-1-2, supra, against issuing a warrant based on "information and belief **only** " and the further mention in the same section of "probable cause," leads us to the conclusion that in these issuance of warrant situations there must be at least some personal knowledge on the part of the complainant.

Summing up, in answer to your first question we do not believe that a police magistrate can accept a complaint and issue a warrant for arrest **solely** on information and belief. We are of the opinion that the requirement of "reasonable grounds to believe" necessitates that the complainant have some pertinent personal knowledge in addition to whatever information he may have received from other credible sources. Such conclusion necessarily requires that your second question also be answered in the negative.

By: Oliver E. Payne

Assistant Attorney General