

IN THE OFFICER’S OMNIPRESENCE:  
LIVE SURVEILLANCE AND WARRANTLESS MISDEMEANOR  
ARRESTS

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At common law, a law enforcement officer who witnesses a crime can make a warrantless misdemeanor arrest so long as the alleged crime was committed in his presence.<sup>1</sup> This requirement has traditionally meant that the arresting officer is physically present at the scene of the crime and witnessed the offense first-hand.

What if the officer were to witness the crime from a remote location via live surveillance technology? On the one hand, he is ‘present’ because he can see and hear the crime as if actually on the scene. Conversely, he is not physically present at the scene.

Courts have interpreted this “presence” requirement in the context of live video surveillance to mean “physically proximate. However, this view has limited practical application and workability. Instead, the presence requirement in this context should be “in the view,” which speaks more to the purpose of the requirement.

I. MODERN LAW ENFORCEMENT TECHNOLOGY

Some law enforcement agencies use cutting edge technology to efficiently spend their limited resources. For instance, in Las Vegas, the police department uses a series of live cameras that are monitored by law enforcement to help curb crime in areas where criminal activity often occurs, or in densely populated areas, like the sidewalks near casinos.<sup>2</sup> In Baltimore’s CityWatch program, former police officers monitor the city via surveillance cameras in order to quickly report an observed crime to

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<sup>1</sup> Carroll v. United States, 267 U.S. 132, 157 (1925); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.5(a) (4th ed. 2017) At common law, there also had to be a breach of the peace, but the Supreme Court found that this element was not required by the 4th Amendment. Atwater v. City of Lago Vista, 532 U.S. 318, 340 (2001).

<sup>2</sup> See *Analytical Section*, Las Vegas Metro. Police Dep’t, <https://www.lvmpd.com/en-us/Pages/AnalyticalSection.aspx> (last visited Feb. 20, 2018); Elaine Pittman & Jim Mckay, *Las Vegas Fusion Center Is a Model for Public-Private Collaboration*, EMERGENCY MANAGEMENT, May 24, 2011, <http://www.govtech.com/em/safety/Las-Vegas-Fusion-Center-Public-Private-Collaboration-052411.html>.

the police department.<sup>3</sup> And in Los Angeles, the civilian oversight board has recently approved a new program that would allow its police department to use drones to surveil its citizens.<sup>4</sup> As cameras, drones, and other live surveillance technologies become more affordable, local governments will continue to utilize this technology to make law enforcement more efficient, and increase their field of view.

## II. MISDEMEANOR OBSERVED THROUGH LIVE SURVEILLANCE

If an officer in one of these jurisdictions is watching a live surveillance camera and observes someone vandalizing a shop front, has the individual committed a crime in the officer's presence? Given that this question involves recent, modern technology, the question will be one of first impression in most jurisdictions; however, the answer is likely yes.

### A. STATE OF THE LAW

In *Forgie-Buccioni v. Hannaford Bros., Inc.*, the First Circuit declined to find that New Hampshire's 'presence' requirement was satisfied when an officer viewed a partial video tape of an individual shoplifting.<sup>5</sup> In that case, the plaintiff bought cold medication, left the store, realized she bought the wrong kind of the same medication, replaced it, and then left again.<sup>6</sup> The store called the police and showed the officer the part of the videotape where plaintiff left with the cold medication without paying.<sup>7</sup> The officer then arrested her for shoplifting.<sup>8</sup> She sued for false arrest and the First Circuit was asked to determine whether the lower court correctly interpreted New Hampshire law.<sup>9</sup> It agreed with the lower court that the arrest was unlawful as a matter of state law because it interpreted the "in the presence"

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<sup>3</sup> POLICE FOUND., A REVIEW OF THE BALTIMORE POLICE DEPARTMENT'S USE OF PERSISTENT SURVEILLANCE 7, (2017), [http://docs.wixstatic.com/ugd/9845f4\\_f7fd26e764374fcaa45115fd32edc22a.pdf](http://docs.wixstatic.com/ugd/9845f4_f7fd26e764374fcaa45115fd32edc22a.pdf).

<sup>4</sup> Kate Mather, *LAPD becomes nation's largest police department to test drones after oversight panel signs off on controversial program*, LA TIMES, Oct. 17, 2017, <http://www.latimes.com/local/lanow/la-me-ln-lapd-drones-20171017-story.html>.; Sam Meredith, *Drones set to be deployed by Los Angeles Police Department*, CNBC, Oct. 18, 2017, <https://www.cnbc.com/2017/10/18/lapd-drones-set-to-be-deployed-by-los-angeles-police-department.html>.

<sup>5</sup> *Forgie-Buccioni v. Hannaford Bros.*, 413 F.3d 175, 180 (1st Cir. 2005).

<sup>6</sup> *Id.* at 178.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

requirement according to its plain language.<sup>10</sup> Since the officer did not “observe” plaintiff shoplifting, the court agreed that the purported criminal conduct was not “in the officer’s presence.” Though this case did not involve live surveillance because the officer viewed the video tape after the fact, it is instructive of how other courts might narrowly construe “presence” as physical observation.

The issue of live surveillance was addressed directly in *City of Everett v. Rhodes*. In that case, the Washington Court of Appeals found that the state’s statutory presence requirement (that mirrors the common law) requires an officer be in close physical proximity of the crime at issue, and thus did not cover remote camera surveillance.<sup>11</sup> Here, an officer observed the defendant light a crack pipe via a live surveillance camera in downtown Everett.<sup>12</sup> The officer signaled for other officers to make contact with the defendant, but by the time they arrived, he had left the scene. Five days later, an officer stopped and arrested the defendant for possession of drug paraphernalia.<sup>13</sup> The court found that the “in the presence” rule demonstrates a “strong public policy preference” that the crime must *physically* take place in the presence of the officer because misdemeanors “pose less threat to society than do felonies.”<sup>14</sup> Relying on the dictionary definition of “presence,” the court strictly construed presence to mean “physical proximity.”<sup>15</sup>

#### B. PHYSICAL PROXIMITY IS A JUDICIAL RABBIT HOLE

Despite the holdings above, it is judicially imprudent to rely on physical proximity in live surveillance cases for the following reasons: (1) it will likely lead to inconsistent holdings; and (2) live surveillance sufficiently satisfies the rationales behind the “in the presence” requirement.

##### *1. Physical Proximity Construction May Lead to Inconsistent Holdings*

If courts decide to strictly construe “presence” to mean “physical proximity” then it will likely lead to confusing and muddled law. Courts have found that witnessing crimes via telescopes,<sup>16</sup> binoculars,<sup>17</sup> and

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<sup>10</sup> *Id.* at 180. Note that the court cited a case that held that federal courts in diversity should not create new doctrines.

<sup>11</sup> *City of Everett v. Rhodes*, 114 Wash. App. 1071 (2002).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Roynon v. Battin*, 132 P.2d 266, 269 (Cal. App. 1942)

<sup>17</sup> *People v. Steinberg*, 307 P.2d 634, 635 (Cal. App. 1957).

radar guns<sup>18</sup> are considered within the ‘presence’ of the observing officer. If courts want to continue to allow police to make arrests based on witnessing a crime with binoculars, how can it distinguish surveillance cameras? Cameras, like binoculars or telescopes, allow a person to observe someone or something from a distance. Certain cameras, also allow officers to hear from a distance. How will courts logically distinguish the two? Will courts make decisions based on precisely how far an officer is from the crime? Is 100 yards too far? Or 500 yards? If courts go down this road, they will either have to distinguish cameras in a formulaic, arbitrary way (e.g. cameras are intrinsically different), or courts will have to decide whether police are proximate enough. Either way, courts will become entangled in their own formalism.

## *2. Live Surveillance Satisfies the Rationales Behind the ‘In Presence’ Requirement*

If courts interpret “in the officer’s presence” to mean “in the view” of the officer,<sup>19</sup> live surveillance fulfills the purposes behind the common law presence requirement. One rationale for the “in the presence” requirement is to avoid arresting an individual for a misdemeanor based solely on hearsay and information from third parties.<sup>20</sup> This idea was illustrated in the facts of *Forgie-Buccioni* discussed in Section A. Since the officer was relying on only part of the video tape shown by the store, he did not know that the woman had already bought the medication earlier and was simply exchanging it for a different kind. However, when an officer views the entirety of a crime remotely, there is no concern with relying on third parties. If courts think this is the central principle behind the common law rule, they should interpret presence to mean “in the view”<sup>21</sup> instead of requiring physical proximity<sup>22</sup> because an officer can view the offense firsthand.

A second rationale given for the presence requirement is: if a misdemeanor is no longer occurring when the officer arrives, there is little to be accomplished by incarcerating the individual.<sup>23</sup> It is true that a police officer who observes a crime from a camera will frequently have to alert nearby officers to arrest the offending individual. That is, the officer will have to rely on officers who are physically proximate to

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<sup>18</sup> *Thompson v. State*, 453 P.2d 314, 317 (Okla. Crim. App. 1969).

<sup>19</sup> See WAYNE R. LAFAYE ET AL., SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 5.1(c) (5th ed. 2017) [hereinafter “LAFAYE, SEARCH AND SEIZURE”]. (“Presence is most commonly thought of as the state of being in view...”).

<sup>20</sup> See Schroder, *supra* note 4, at 805.

<sup>21</sup> See LAFAYE, SEARCH AND SEIZURE, *supra* note 19.

<sup>22</sup> See *City of Everett v. Rhodes*, 114 Wash. App. 1071 (2002).

<sup>23</sup> See *id.* at 789.

make the arrest. However, the same can be said for officers with telescopes, binoculars, radar guns, or even police officers in helicopters, all of whom may have to rely on another officer to make an arrest. Moreover, when a police officer calls for back up, courts do not prevent the backup officer from making the arrest because he is relying on another officer's contemporaneous observation.<sup>24</sup> The *Rhodes* court is right that misdemeanors are generally less serious crimes than felonies.<sup>25</sup> However, it is not clear why that should suggest a policy preference that enforcement should depend on fortune, that is, whether a police officer happens to be nearby when a vandal paints graffiti on a store. Moreover, cameras are often placed with a policy preference in mind—in places where there are frequent crimes or heavy populations. So, as long as the perpetrator is swiftly captured by a nearby officer, the outcome is the same as if an officer happened to be physically there to witness the crime take place. Accordingly, live surveillance sufficiently fulfills the second reason behind the “in the presence” requirement.

### C. WHAT COURTS SHOULD DO

Instead of limiting the officer presence requirement to mere physical proximity, courts should limit how long the police may take to make an arrest after witnessing a crime. Long-existing case law has found that the “presence” requirement is not satisfied when too much time has elapsed between an officer witnessing the activity and the resulting arrest.<sup>26</sup> For example, the *Rhodes* court noted the five day lapse between the officer observing the defendant light a drug pipe and the eventual arrest.<sup>27</sup> Rather than disqualifying the arrest due to lack of physical proximity, the court in *Rhodes* should have found that too much time had elapsed between the officer witnessing the crime and the arrest. The result would allow officers to continue to use live surveillance technology, which is reliable and cost efficient. Even more, it would also curb police power in instances where too much time has elapsed and little is served in making a misdemeanor arrest.

### CONCLUSION

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<sup>24</sup> See *People v. Dixon*, 392 Mich. 691, 698 (1974) (explaining the “police team” theory accepted by various courts) (*abrogated on other grounds* by *People v. Hawkins*, 468 Mich. 488, 668 N.W.2d 602 (2003)).

<sup>25</sup> 22 C.J.S. Criminal Law: Substantive Principles § 16 (2018).

<sup>26</sup> See LAFAVE, SEARCH AND SEIZURE, *supra* note 19 (“The general rule here is that such a warrantless arrest must be made promptly, that is, at the time of the offense or as soon thereafter as circumstances permit.”).

<sup>27</sup> *Rhodes*, 114 Wash. App. 1071.

Live surveillance technology may broaden what it means to be “in the officer’s presence.” Since the Supreme Court has not decided whether this common law rule is required by the 4th Amendment, states can refine the rule by statute to clarify whether they intend for surveillance camera programs to count as “presence.”<sup>28</sup> Courts that are concerned with police power should not limit the requirement with the formalistic trappings of “physical proximity” as it will likely muddy the presence doctrine. Instead, they should interpret presence to mean “in the view” as it accords with the purposes behind the rule. To curb police power, courts should instead limit how long an officer may take to make an arrest after witnessing a crime, as some courts have done in the past.

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<sup>28</sup> Some states have made statutory exceptions for live traffic cameras for instance. *See* Ohio Rev. Code Ann. § 4511.093 (West 2015).