**15.04 False Arrest – Privilege of Peace Officer or Private Citizen**

 **to Arrest Without Warrant**

The defendant claims that the arrest of the plaintiff was privileged. In order for the defendant to establish this claim, you decide it is more likely true than not true that:

(here set forth the evidence of facts which, if true, would establish reasonable cause for the defendant to believe that the plaintiff was committing or was attempting to commit a misdemeanor in the defendant's presence or that the defendant had reasonable cause to believe that the plaintiff had committed a felony as a matter of law.)

If you decide the law allows the defendant to arrest the plaintiff, you must return a verdict for the defendant. If you decide otherwise, you must return a verdict for the plaintiff.

# Use Note

## This instruction should be used where the defendant asserts a privilege to arrest. It applies to both peace officers and private citizens. It should follow Instruction 15.03.

This instruction is designed to encompass only the most common instances of arrest without a warrant. Alaska law authorizes warrantless arrests in specific contexts not covered by this instruction. See AS 12.25.030(b) (1985 Supp.) (assault against member of household); AS 12.25.033 (1978 Supp.) (arrest in certain motor vehicle offenses).

The Alaska Supreme Court has held that where there is no factual dispute, what constitutes reasonable cause to make an arrest is a matter of law to be decided by the court. City of Nome v. Ailak, 570 P.2d 162 (Alaska 1977). This instruction submits to the jury conflicts over facts that if true would establish reasonable cause.

In complex cases, the court should submit special interrogatories to determine the juries factual findings necessary to support a legal conclusion ofreasonable cause. See, Malvo v. J.C. Penney Co., Inc., 512 P. 2d 575 (Alaska 1973), suggesting the "best method" of instructing thejury in an analogous situation is by using special interrogatories.

Comment

As a defense to an action for false arrest, a peace officer or private citizen may assert a privilege to arrest. The power of a peace officer or private citizen to make an arrest without a warrant in Alaska is governed by AS 12.25.030 (Supp. 1985). The Alaska Court has assumed that the statutory provision applies to civil false arrest cases. City of Nome v. Ailak, 570 P.2d 162 (Alaska 1977). The general provisions of the statute read as follows:

(a) A private person or a peace officer without a warrant may arrest a person

(1) for a crime committed or attempted in his presence;

(2) when the person has committed a felony, although not in his presence;

(3) when a felony has in fact been committed, and he has reasonable cause for believing the person to have committed it.

(b) In addition to the authority granted under (a) of this section, a peace officer without a warrant may arrest a person when the peace officer has reasonable cause for believing that the person has committed a crime under AS 11.41, AS 11.46.330 or AS 11.61.120, or has violated an ordinance with elements substantially similar to the elements of a crime under AS 11.41, AS 11.46.330, or AS 11.61.120, when the victim is a spouse or a former spouse of the person who committed the crime; a parent, grandparent, child or grandchild of the person who committed the crime; a member of the social unit comprised of those living together in the same dwelling as the person who committed the crime; or another person who is not a spouse or former spouse of the person who committed the crime but who previously lived in a spousal relationship with the person who committed the crime.

The statute is ambiguous when read in the context of constitutional limitations on the law of arrest and the common law background for arrest powers. Alaska case law does not resolve these ambiguities and thus this instruction must be used with caution.

Subsection (a) of the statute purports to authorize arrests without warrants by both peace officers and private citizens in three circumstances. Subparagraph (1) applies to both felony and misdemeanor offenses committed in the presence of the arresting party. Although the statute on its face does not specify a probable cause test, the Alaska Supreme Court has read into arrests under subparagraph (1) a provision of probable or reasonable cause. Howes v. State, 503 P.2d 1055 (Alaska 1972); Miller v. State, 462 P.2d 421 (Alaska 1969). In Miller, the court held that an arrest is lawful without a warrant:

where the peace officer has perceived facts which would lead a reasonable man to believe that the arrestee has committed or attempted to commit an offense in his presence. 462 P.2d at 425‑26.

And in Howes, the court held that whether an offense is committed in the "presence" of the arresting party involves two elements:

(1) The officer must observe acts which are indicative of the commission of an offense; (2) The officer must be aware that he is in fact seeing an offense being committed. 503 P.2d at 1058.

All of these elements are captured in the first bracketed paragraph of the instruction.

Subparagraphs (a)(2) and (a)(3) of the statute when read together are difficult to interpret. Both provisions apply to felony arrests for crimes committed outside the presence of the arresting party. It appears that (2) governs the case where the arrested person was guilty of the felony and an arrest occurs even though the arresting party does not have reasonable cause. Provision (3) then appears to govern those cases where the person is innocent but the arresting party has reasonable cause. This provision also appears to make the legality of the arrest depend on whether a felony was "in fact" committed regardless of whether or not the arresting party reasonably thought so. This interpretation of provision (3) is supported by the history of the statute and the common law tradition of arrest.

For offenses committed outside the presence of the arresting party, the common law distinguished between the authority of a peace officer and that of a private citizen. The peace officer could arrest for felonies if the officer had reasonable cause to believe both that an offense had been committed and that the person arrested committed it. A private citizen, on the other hand, was liable for false arrest if it subsequently turned out that no felony was in fact committed even though the private citizen reasonably thought otherwise. It appears that the Alaska Legislature, in applying the same rules to both peace officers and private citizens, may have adopted the more restrictive rule formerly applied only to citizen arrests. The Alaska statute is identical to an early California statute, Calf. Penal Code § 836, that was specifically amended in 1957 to apply the more liberal reasonable cause test to both existence of a felony and the identity of the felon.

Alaska case law, however, suggests that at least in a criminal law context, the Alaska court may be unwilling to apply this interpretation of subparagraphs (2) and (3). An interpretation of (2) that authorized an arrest without probable cause when it subsequently was shown the arrested person was guilty would be unconstitutional – at least to the extent that evidence acquired incident to such an arrest would be suppressed. Beck v. Ohio, 379 U.W. 89 (1964). It is also likely that since the Alaska court has read a probable cause test into subparagraph (1), it would read a similar standard into subparagraph (2). To do so, however, would make provision (2) inconsistent and in conflict with provision (3).

The Alaska court, on the other hand, apparently has applied a reasonable cause standard to both the commission of the offense and the identity of the offenders under provision (3) of the statute notwithstanding the language requiring the felony to have been committed "in fact." McCoy v. State, 491 P.2d 127 (Alaska 1971). It is not clear in McCoy that the point was specifically argued, and the issue in McCoy was not whether some offense had been committed, but whether the offense committed had in fact amounted to a felony. In that context the court concluded:

we hold that under AS 12.25.030(3) a peace officer without a warrant, may arrest a person for a felony when the officer has probable cause to believe that a felony has been committed and probable cause to believe that the person committed it. 491 P.2d at 130.

In light of these uncertainties, no instruction is proposed responding to provision (2). The proposed instruction responds to the language in McCoy, supra, applying the reasonable cause standard to both the commission of the offense and the identity of the offenser. If the "in fact" language of the statute is thought to apply to whether the offense occurred, the instruction could be modified by substituting the following language: "a felony was in fact committed by someone and the defendant had reasonable cause to believe the plaintiff had committed it."