

Not what is, but what is to be ...

Anticipatory Search Warrants

What is it?

- An "anticipatory search warrant" is:
 - "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place"

The "trigger"

- P.C. is *anticipated* to exist when a "triggering condition" occurs
- For example,
 - "execution of the search warrant will not occur *unless and until* the parcel containing the child pornography *has been received* by a person and *has been physically taken* into the residence"

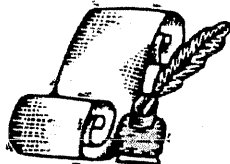
- U.S. v. Grubbs, 547 U.S. 90 (2006)

Probable cause

- P.C. doesn't exist to believe evidence will be found *right now*
- P.C. is based on *prediction* that evidence will be found *after* the "triggering condition"

What about the 4th Amendment?

- The 4th Amendment provides that



"... no Warrants shall issue, but upon probable cause"

If there's no p.c. *now*, can I issue the warrant?

- P.C. depends on a "fair probability" that evidence will be found
- The P.C. for *every* warrant anticipates that evidence will be there *when the search is conducted*
- You are *always* deciding whether the item will still be there when the warrant is executed

Your job

- "Anticipatory warrants require the magistrate to determine
 - (1) that it is *now probable* that
 - (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises
 - (3) when the warrant is executed."

- *U.S. v. Grubbs*, 547 U.S. 90 (2006)

... in other words ...

- There are two prerequisites to a P.C. determination for a conditioned anticipatory warrant:
 - *If* the triggering condition occurs "there is a fair probability that contraband or evidence of a crime will be found in a particular place" and
 - There is probable cause to believe the triggering condition *will occur*

Must the warrant specify the triggering condition?

- The 4th Amendment specifies only two things that must be "particularly described":
 - The place to be searched
 - The persons or things to be seized

Why not require inclusion of the triggering condition?

- A warrant need not set forth the basis for finding probable cause, much less a triggering condition.
- The property owner has no right to a copy of the warrant before it is executed.
 - "The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by imposing, *ex ante*, the "deliberate, impartial judgment of a judicial officer." - *U.S. v. Grubbs*, 547 U.S. 90 (2006)

Why *would* the triggering condition be included in the warrant?

- The warrant might not be executed by the officer who obtained it.
 - The executing officer might be unaware of the need for a triggering condition.
 - If the condition has not been met when executed, the search pursuant to the warrant is unreasonable.
- Stating the condition may give the owner the ability to correct the misapprehension that the condition *has* been met.

Does Texas Law Authorize Anticipatory Warrants?



A *Toone* with a Texas melody ...

- In *Toone v. State*, a federal warrant was obtained to search for child porn in anticipation of delivery of the porn to defendant's house by a federal agent.
- Cocaine was found during execution of the search warrant and defendant was prosecuted for possession in state court.

Toone's lament



- *Argument 1*: Article 18.01(b) prohibits anticipatory warrants
- "No search warrant shall issue ... unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause *does in fact exist* for its issuance."

Second verse:



- *Argument 2*: Article 18.01(c) prohibits anticipatory warrants
- "A search warrant may not be issued under Article 18.02(10) unless the sworn affidavit ... sets forth sufficient facts to establish probable cause: ... (3) that the property or items constituting evidence to be searched for or seized *are located* at or on the particular person, place, or thing to be searched."

Court of Appeals' refrain



- There's no Texas case law, but other state and federal courts allow them, so why not us?
- But in any event, the federal warrant is valid in federal courts, so the cocaine may be used in a Texas court proceeding. ("Reverse silver-platter doctrine")
- Conviction affirmed.



A sad Toone

So, what about Toone's Art.18.01 arguments?

- The Court avoided that for now, but stay *Tooned*.

(sorry)

Toone II

- The Court of Criminal Appeals affirms on different grounds.
 - Art. 38.23(a) requires exclusion of evidence only if obtained in violation of the Constitution or laws of the U.S. or Texas.
 - Only Art. 18.01 is alleged to be violated and it only governs Texas search warrants, BUT ...
 - This was a federal warrant, and THEREFORE
 - It isn't a "search warrant" under Art. 18.01. CONSEQUENTLY, ...

Syllogism complete ...

- The Texas Exclusionary Rule – Article 38.23(a) – doesn't apply because Article 18.01 wasn't (couldn't be) "violated" by a federal warrant

STATE WINS.

But do we have anticipatory warrants under TEXAS LAW???

- *Well It depends.*
- Toone's textual arguments were never addressed by either appellate court.
- Consider Art. 18.01(b): "No search warrant shall issue ... unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause *does in fact exist* for its issuance."

A loser?

- Under the formula of *Grubbs*, probable cause *does* exist (and must exist) to believe the item *will be* at the location
- In that sense, P.C. "does in fact exist"

What about Toone's other argument?

- Art. 18.01(c) requires that P.C. exist to believe "...that the property or items constituting evidence to be searched for or seized *are located* at or on the particular person, place, or thing to be searched."
- If the item isn't located on the premises at the time the warrant is sought, can you issue the warrant?

Does Article 18.01(c) prohibit ALL anticipatory warrants in Texas?

- Art. 18.01(c) applies only to warrants issued under Art. 18.02(10)
- For all other kinds of warrants, there is no similar limiting statutory language

What warrants are covered by Art. 18.02(10)?

- Art. 18.02(10) applies to "evidentiary warrants" only
- An "evidentiary warrant" is one for items of evidentiary value that are *not* contraband, fruits of a crime, or instrumentalities of a crime.
- *In other words, it's for items of "MERE evidence."*

Bottom line

- A federal anticipatory search warrant is allowed in Texas
- A purely state anticipatory search warrant may be allowed (not yet decided), BUT
- A state anticipatory search warrant for items of "mere evidence" probably isn't authorized by Texas law

Other considerations?

- If you issue an anticipatory warrant, you may want to add language limiting the time it will remain effective
- Even though not required by the Supreme Court, it may be a good idea to include in the warrant a description of the "triggering condition"

Or maybe a "workaround"?

- The "standby affiant"



- Anticipatory, yes, but not an anticipatory warrant

Anticipation can be a wonderful thing ...



... but you don't always get what you want.
