



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

Gerald C. Mann  
~~XXXXXXXXXXXXXXXXXX~~  
ATTORNEY GENERAL

Hon. Wayne Lefevre  
County Auditor  
Clay County  
Henrietta, Texas

Opinion No. 0-4929  
Re: Under the facts submitted does a  
peace officer have the legal authority  
to arrest and search a person possess-  
ing liquor without a warrant of arrest?

Dear Sir:

Your letter of October 9, 1942, requesting the opin-  
ion of this department on the above stated question, reads in  
part as follows:

"Please answer the following question for me.

"If a law enforcement officer suspects a person  
to be in possession of alcoholic beverages in a dry  
territory for purpose of sale and searches this per-  
son outside of his home and finds what he was looking  
for. Is it necessary for this officer to have a  
search warrant to lawfully search and arrest this per-  
son? Taking into consideration that the suspected  
person has been convicted of the same charge many  
times in the past."

As we understand your request, you desire our opin-  
ion on the question, whether or not a peace officer can legally  
arrest and search a person under the facts submitted without a  
warrant of arrest.

Generally speaking the laws of this State have ex-  
pressly authorized peace officers to make arrests without war-  
rants in a great many cases. (Articles 212-217, Vernon's Anno-  
tated Code of Criminal Procedure) Thus generally an arrest may  
be made when an offense which is a felony or which is against  
the public peace is committed in the presence or within the  
view of the arresting party, or when it is shown by satisfactory  
proof to a peace officer, upon the representation of a credible  
person, that a certain party has committed a felony, and is  
about to escape. Other circumstances giving rise to authority  
to arrest without warrant are the verbal order of a magistrate  
before whom a felony or breach of the peace has been committed,  
or the existence of a city ordinance passed in conformity with  
State law and commanding search and arrest under prescribed  
conditions.

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Under the Texas Liquor Control Act the possessing of liquor as defined in said act for the purpose of sale in a dry area is only a misdemeanor offense. The possession of liquor for the purpose of sale in a dry area is not a breach of the peace within itself. For the purpose of this opinion we assume that no city ordinance is involved.

We have carefully considered Article 666-20 and Article 666-44, Vernon's Annotated Penal Code, and have concluded that these statutes are not applicable to the question under consideration as the search of buildings, premises or vehicles of transportation is not mentioned in your inquiry.

In view of the foregoing you are respectfully advised that it is our opinion that the peace officer has no authority to arrest the person in question without a legal warrant of arrest.

In connection with the foregoing we wish to point out that it is a settled rule that no search warrant is essential in order to search the person of one lawfully under arrest for the purpose of finding and seizing dangerous weapons, the instruments or fruits of a crime, and such other things as may be of use as evidence on the trial. Even in cases where the law permits an arrest without warrant the right to search the person arrested follows as an incident to the arrest, and this naturally implies a search contemporaneous with the arrest. In the language of the United States Supreme Court (Agnello v. United States, 269 U.S. 20) frequently quoted and approved by the Texas Court:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruit or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

Trusting that the foregoing fully answers your inquiry, we are

APPROVED OCT 29, 1942  
/s/ Gerald C. Mann  
ATTORNEY GENERAL OF TEXAS

Yours very truly  
ATTORNEY GENERAL OF TEXAS  
By /s/ Ardell Williams  
Ardell Williams, Assistant

APPROVED: OPINION COMMITTEE  
BY: BWB, CHAIRMAN  
AW: AMM:wb