

STATE OF MINNESOTA IN SUPREME COURT

C1-84-2137

PROMULGATION OF AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

WHEREAS, the Supreme Court Advisory Committee on Rules of Criminal Procedure has submitted a report and recommended amendments to Rule 4 and Rule 34.01 of the Rules of Criminal Procedure, and

WHEREAS, the Supreme Court held a hearing on the proposed amendments on September 10, 1992, and

WHEREAS, the Supreme Court has reviewed the recommendations and is fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The attached amendments creating Rule 4.03 and amending 34.01 of the Rules of Criminal Procedure be, and the same hereby are, prescribed and promulgated for the regulation of practice and procedure in criminal matters in the courts of the State of Minnesota.

2. The inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the comments made therein.

3. The Advisory Committee shall continue to serve to monitor said rules and amendments and to hear and accept comments for further changes, to be submitted to the court from time to time.

4. These amendments to the Rules of Criminal Procedure shall govern all criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1993.

Dated: October 23, 1992

BY THE COURT

-s-A. M. Keith
Chief Justice

Rules of Criminal Procedure

Effective January 2, 1990
 Governing All Criminal Actions Commenced or Arrests
 Made After 12 o'clock Midnight January 1, 1990
 With amendments received through July 15, 1993

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[For text of 1. to 4.02, see M.S. 1992, Volume 9]

4.03 Probable Cause Determination

Subd. 1. Time Limit. When a person arrested without a warrant is not earlier released pursuant to this rule or Rule 6, a judge or judicial officer shall make a probable cause determination without unnecessary delay and in any event within 48 hours from the time of the arrest including the day of arrest, Saturdays, Sundays and legal holidays. If the Court determines that probable cause does not exist or if there is no determination as to probable cause within the time as provided by this rule, the person shall be released immediately.

Subd. 2. Application and Record. The facts establishing probable cause to believe that an offense has been committed and that the person arrested committed it shall be submitted upon oath either orally or in writing. The oath shall be administered by the judge or judicial officer for any facts submitted orally and may also be administered by the clerk or deputy clerk of court or notary public for any facts submitted in writing. Any oral testimony shall be recorded by reporter or recording instrument and shall be retained by the judge or judicial officer or by the judge's or judicial officer's designee. Any written or oral facts or other information submitted upon oath to establish probable cause may be made or taken by telephone, facsimile transmission, video equipment or similar device at the discretion of the reviewing judge or judicial officer. The person requesting a probable cause determination shall advise the reviewing judge or judicial officer of any prior request for a probable cause determination on this same incident or of any prior release of the arrested person on this same incident for failure to obtain a probable cause determination within the time limit as provided by this rule.

Subd. 3. Prosecuting Attorney. No request for determination of probable cause may proceed without the approval, in writing or orally on the record, of the prosecuting attorney authorized to prosecute the matter involved, or by affirmation of the applicant upon the application that the applicant has contacted the prosecuting attorney and the prosecuting attorney has approved the request, or unless the judge or judicial officer reviewing probable cause certifies in writing that the prosecuting attorney is unavailable and the determination of probable cause should not be delayed. If, in the discretion of the prosecuting attorney, a complaint complying with Rule 2 is obtained within the time limit provided by this rule, it shall not be necessary to obtain any further determination of probable cause under this rule to justify continued detention of the defendant.

Subd. 4. Determination. Upon the information presented, the Court shall determine whether there is probable cause to believe that an offense has been committed and that the person arrested committed the offense. If probable cause is found, the Court may set bail or other conditions of release or release the arrested person without bail pursuant to Rule 6. If probable cause is not found, the arrested person shall be released

immediately. The determination of the Court shall be in writing and shall indicate whether probable cause was found, and, if so, for what offense, whether oral testimony was received concerning probable cause, and the amount of any bail or other conditions of release which the Court may have set. A written notice of the Court's determination shall be provided to the arrested person forthwith.

(Added effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1993.)

Comment

By Rule 4.01 a defendant arrested following a complaint shall be dealt with as directed by Rule 3.02, subd. 2.

Rule 4.02, subd. 1 directs an officer who makes an arrest without a warrant or the officer's superior to release the arrested person before the initial appearance in court without proceeding further, if the officer determines that further detention is not justified. This might occur when, for example, further investigation disclosed to the satisfaction of the officer that the defendant did not commit the offense for which arrested. (See similar provisions in ALI Model Code of Pre-Arrest Procedure, section 120.9(2) (Proposed Official Draft #1, 1972), Wis.Stat., sec. 968.08)).

Rule 4.02, subd. 4 similarly authorizes the prosecuting attorney to order the release of a person arrested without a warrant without proceeding further. This would occur, for example, if the prosecuting attorney decides not to file a complaint.

Rule 4.02, subd. 3 provides that the prosecuting attorney shall be notified of an arrest without a warrant as soon as practical in order to determine whether to continue the prosecution and, if so, to draw a complaint.

Rule 4.02, subd. 2 provides that the officer arresting without a warrant or the officer's superior may issue a citation as provided by Rule 6.01 and must do so if ordered by the prosecuting attorney or by a judge or judicial officer described in the rule.

*Rule 4.02, subd. 5(1) prescribing the time within which a person arrested without a warrant shall be first brought before the court recognizes that additional time is needed to determine whether to continue the prosecution and to draw the complaint. So there is no requirement that the defendant be brought promptly before the appropriate court after arrest if the court is in session, but it is necessary under Rule 4.02, subd. 5(1) that the defendant be brought before such court without "unnecessary delay." (Compare Rule 3.02, subd. 2.) The 36-hour period does not include the day of arrest, Sundays, or legal holidays. Otherwise the intent of Rule 4.02, subd. 5(1) and Rule 3.02, subd. 2 is the same, namely, that the 36-hour period is not an automatic holding period and that the defendant shall be brought before the court at the earliest possible time within the period. In exceptional cases, however, the prosecuting attorney shall not be precluded by this section from seeking relief pursuant to Rule 34.02. The effect of failure to comply with Rules 4.02, subd. 5(1) and 3.02, subd. 2 on the admission of confessions or other evidence or on the jurisdiction of the court is left to case-by-case development. In *State v. Wiberg*, 296 N.W.2d 388 (Minn.1980) the Supreme Court held that violation of the time limits set forth in Rule 4.02, subd. 5(1) does not require the automatic exclusion of statements made which have a reasonable relationship to the violation. Rather, the admissibility of the statements depends on such factors as the reliability of the evidence, the length of the delay, whether the delay was intentional, and whether the delay compounded the effects of other police misconduct. In *Wiberg* the Supreme Court found a violation of Rule 4.02, subd. 5(1) even though 36 hours had not yet elapsed exclusive of the day of arrest. The court noted that such unexplained delays as occurred in *Wiberg* should weigh heavily in the trial court's determination of whether to exclude any statements. For the application of this same suppression test to identification evidence see *Meyer v. State*, 316 N.W.2d 545 (Minn.1982).*

Where the defendant agrees, Rule 4.02, subd. 5(3) provides the procedure for initiating misdemeanor proceedings or gross misdemeanor proceedings under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129 without the necessity of issuing a complaint or obtaining an indictment as is required for felonies and other gross

misdeemeanors. This is provided to avoid the unnecessary delay for a defendant and to aid a prosecutor in those cases where the defendant may not even desire a complaint if sufficiently informed in some other way of the charges. When a defendant first appears in court following a warrantless arrest in such cases, the clerk shall enter on the records a brief statement (tab charge) of the offense charged, including a citation to the statute, ordinance, rule, regulation or provision of law which the defendant is alleged to have violated. This statement shall be a substitute for the complaint and is sufficient to initiate the proceedings in such cases under Rule 10.01 unless the defendant, defense counsel or the court requests that a complaint be filed. This provision for tab charges is substantially consistent with present Minnesota law for misdemeanors although under the present statutes the right to a complaint varies from court to court. See Minnesota Statutes, section 487.25, subd. 4, and Minnesota Statutes, section 488A.10, subd. 4 (In the county courts and in Hennepin County Municipal Court, a tab charge is sufficient unless the judge orders or the defendant requests a complaint); Minnesota Statutes, section 488A.27, subd. 4 (In St. Paul a tab charge is sufficient unless the judge orders a complaint); and Minnesota Statutes, section 488.17, subd. 4 (In any other municipal court the tab charge is sufficient where the defendant is in custody when appearing before the court, unless the court orders a complaint).

Unless a complaint is requested, Rule 4.02, subd. 5(3) permits the use of a tab charge to initiate a prosecution for gross misdemeanor driving while intoxicated under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129. The provisions concerning tab charges were extended to gross misdemeanor driving while intoxicated proceedings because of concern that such proceedings will not otherwise be prosecuted and completed promptly. When the rules were originally promulgated, there were few gross misdemeanor prosecutions. Due primarily to Minnesota Statutes, sections 169.121 and 169.129, the number of gross misdemeanor prosecutions has increased tremendously. Unfortunately, prosecutorial resources have not increased proportionately and in some jurisdictions prosecutions for gross misdemeanor driving while intoxicated have been delayed substantially pending issuance of complaints. The use of tab charges should get such cases into court promptly. A defendant who wants a complaint may then request it. Otherwise, the proceedings may continue based on the tab charge. All other gross misdemeanors must be charged by complaint or indictment as required by Rules 4.02, subd. 5(2) and 17.01. Except for the use of the tab charge, the procedure for gross misdemeanor prosecutions under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129 is the same as for gross misdemeanor prosecutions under any other statute. If a complaint is requested the appearance under Rule 5 is continued pending issuance of the complaint. The time limit specified in Rule 5.03 for having the initial appearance under Rule 8 does not then begin to run until the complaint is filed. If no valid complaint is filed as required by the rules, the proceedings are dismissed. If a valid complaint is filed or if no complaint is requested, the proceedings continue on under Rule 5 and Rule 8.

Under Rule 5.01 a defendant must be advised of the right to demand a complaint. It is anticipated that complaints will be requested by defendants in only a small percentage of misdemeanor cases because discovery is permitted under Rule 7.03, and most defendants will not wish to make an additional appearance to receive the complaint.

If a complaint is required under this rule, the prosecutor must file a valid complaint within 48 hours if the defendant is in custody or within 30 days if the defendant is not in custody or the tab charge must be dismissed. A longer time limit than 48 hours for those defendants in custody would encourage defendants who are in jail pending issuance of a complaint to waive that right in order to speed up the disposition of the charges. Time limits, of course, can be waived by a defendant. A defendant who is not in custody, may wish to request a later time to receive the complaint, for the defendant's convenience and that of the defense counsel and the prosecutor.

A complaint to be valid must comply with the requirements of Rule 2 and the issuing officer must have made a determination of probable cause.

Where a charge has been dismissed by the court for failure of the prosecutor to file a valid, timely complaint (Rule 4.02, subd. 5(3)) as required and the prosecutor subse-

quently files a valid complaint, a summons must be issued instead of a warrant. If it is impossible to locate the defendant to serve the summons or if the defendant fails to respond to the summons, a warrant may be issued. (See also Rule 3.01.) This restriction is considered justified since it is unfair to subject a defendant to a possibly unnecessary arrest when the defendant has appeared in court once to answer the minor charge, and, through no fault of the defendant, a complaint was not issued at that time.

Where the tab charge has been dismissed for failure to file a valid, timely complaint as required, the prosecutor must file a valid complaint within the time specified by Rule 17.06, subd. 4(3) or any further prosecution is barred if so ordered by the court.

When a valid complaint has been filed or waived, defendant will be arraigned pursuant to Rule 5.

Rule 4.02, subd. 5(2) provides that on or before the first appearance of a person arrested without a warrant a complaint shall be filed provided it has the written approval of the prosecuting attorney or the certificate of the court as provided in Rule 2.02 and the judge or judicial officer has made a finding of probable cause. Otherwise the defendant shall be discharged. The rule is not intended to cover the effect of the discharge on subsequent prosecution for the same offense or conduct. (See *State v. Uglum*, 175 Minn. 607, 222 N.W. 280 (1928).)

Rule 4.02, subd. 5(2) permits the complaint to be presented either to the judge or judicial officer before whom the defendant will appear or to any judge or judicial officer authorized to issue a warrant of arrest upon the complaint. If the judge or judicial officer to whom the complaint is presented determines that there is probable cause to believe that defendant committed the offense charged, the complaint shall be filed, and in lieu of a warrant of arrest (which is the present practice), an order for detention of the defendant pending further proceedings shall be issued.

Rule 4.03 is based upon the constitutional requirement as set forth in *County of Riverside v. McLaughlin*, — U.S. —, 111 S. Ct. 1661 (1991) for a prompt judicial determination of probable cause following a warrantless arrest. Pursuant to that case and Rule 4.03, subd. 1, the determination must occur without unreasonable delay and in no event later than 48 hours after the arrest. There are no exclusions in computing the 48-hour time limit; Rule 34.01 does not apply. Even a probable cause determination within 48 hours will be too late if there has been unreasonable delay in obtaining the determination. "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *County of Riverside v. McLaughlin*, —, U.S. —, 111 S. Ct. 1661, 1670 (1991). The requirements of Rule 4.03 are in addition to the requirements of Rule 4.02 that a person arrested without a warrant be brought before a judge or judicial officer within 36 hours after the arrest exclusive of the day of arrest, Sundays and legal holidays. Because of the exclusions permitted in computing time under the "36-hour rule," compliance with that rule will not assure compliance with the "48-hour rule." However, if a defendant does appear in court within the time limits of the "48-hour rule" as well as the "36-hour rule" and a valid complaint is then issued, Rule 4.03 is satisfied and no further determination of probable cause is necessary.

The "48-hour rule" also applies to all misdemeanor cases. For gross misdemeanors prosecuted under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129 and for misdemeanors, Rule 4.02, subd. 5(3) requires only that a tab charge be entered on the records at the time of a defendant's appearance in Court within the "36-hour rule." A complaint may be issued at that time but is not then required and need only be issued later if requested by the defendant. However, the requirements of Rule 4.03 still apply and, even if not requested by a defendant, there must be a judicial determination of probable cause within 48 hours of an arrest and detention or the arrested person must be released whether the offense involved is a felony, gross misdemeanor, or misdemeanor. Rule 6.01 provides for the mandatory and permissive issuance of citations and an arrested person released on citation prior to the 48-hour time limit need not receive a probable cause determination pursuant to Rule 4.03.

Release of an arrested person pursuant to Rule 4.03, subd. 1 because of a determina-

tion that probable cause does not exist, or because no determination is made within the specified time limit, does not prevent later prosecution for the offense involved or arrest for a different incident. However, it is not permissible to attempt to extend the time limit of the rule by releasing and then rearresting an individual without a warrant without additional facts to establish probable cause. As it is for the "36-hour rule" these rules do not provide sanctions for violation of the "48-hour rule." That is left to case law development. See *State v. Wiberg*, 296 N.W.2d 388 (Minn. 1980) as to the possible suppression of evidence for violation of the "36-hour rule."

Under Rule 4.03, subd. 2 the facts submitted to the court to establish probable cause may be either by written affidavit or sworn oral testimony. See Form 44, Application for Judicial Determination of Probable Cause to Detain, following these rules. If oral testimony is submitted, the oath shall be administered by the judge or judicial officer, but may be done by telephone, facsimile transmission, video equipment or similar device in the discretion of the reviewing judge or judicial officer. As of May, 1992, the only judicial officer in Minnesota serves in St. Louis county pursuant to Minnesota Statutes, section 487.08. See Rule 33.05 as to use of facsimile transmission generally. Any written affidavits submitted may be sworn to before a clerk or deputy clerk of court or notary public as well as before the reviewing judge or judicial officer. The procedure for obtaining the probable cause determination is similar to that for obtaining a complaint under Rule 2 and no appearance by the arrested person is required.

Under Rule 4.03, subd. 3 the prosecuting attorney's written or oral approval is necessary in the probable cause proceedings. However, as for complaints under Rule 2.02, the court may proceed without such approval upon certifying in writing that the prosecuting attorney is unavailable and the determination of probable cause should not be delayed. Instead of obtaining a probable cause determination under Rule 4.03, the prosecuting attorney has the option of obtaining a complaint complying with Rule 2 within the time limit provided by Rule 4.03. If that is done, the time for the defendant's appearance before the judge or judicial officer is still governed by the "36-hour" provision of Rule 4.02.

Rule 4.03, subd. 4 sets forth the elements to be included in the court's written determination of probable cause. See Form 45, Judicial Determination of Probable Cause to Detain, following these rules. It need not contain a recitation of the facts upon which the court's determination was based. The court may set bail or other conditions of release. If the court sets conditions other than money bail on which the defendant may be released, the court shall also fix the amount of money bail without other conditions upon which the defendant may obtain release. See Rule 6.01, subd. 1 and the comments to that rule. The arrested person must be provided with a written notice of the court's determination forthwith. See Form 46, Notice of Judicial Determination of Probable Cause to Detain, following the rules. It is not necessary that the actual determination or a copy of it be provided to the arrested person forthwith. That may be difficult or impossible in some cases, particularly if the telephone or other electronic means were used in obtaining the determination. The written notice containing the elements of the determination may be prepared by someone other than the reviewing judge or judicial officer. See Minnesota Statutes, section 611.32, subd. 2 and *State v. Mitjans*, 408 N.W.2d 824 (Minn. 1987) as to the obligation of a law enforcement officer, with the assistance of an interpreter, to explain to an arrested person handicapped in communication all charges filed against the person and all procedure relating to the person's detention and release. It is not necessary to forthwith provide the arrested person with any affidavits, transcribed testimony, or other materials submitted to the court upon the application for a probable cause determination. If prosecution is commenced, those materials may be obtained by the defendant later through discovery under Rule 9.01, subd. 1 for felonies and gross misdemeanors and under Rule 7.03 for misdemeanors. Otherwise, access to any such materials is governed by Minnesota Statutes, section 13.82 of the Minnesota government data practices act.

(Last six paragraphs were added to comment effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1993.)

[For text of 5. to 33.05, see M.S. 1992, Volume 9]

Rule 34. Time

34.01 Computation

Except as provided by Rules 3.02, subd. 2(2), 4.02, subd. 5(1), 4.02, subd. 5(3), and 4.03, time shall be computed as follows:

The day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is seven days or less, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday (Presidents' Birthday), Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States or by the State.

(Amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1993.)

See Rule 34.05 for Comment.

[For text of 34.02 to 35., see M.S. 1992, Volume 9]

CRIMINAL FORMS

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INTRODUCTORY STATEMENT

The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a complete manual of forms.

[For text of 1. to 43., see M.S. 1992, Volume 9]

FORM 44

STATE OF MINNESOTA COUNTY OF _____ DISTRICT COURT

APPLICATION FOR JUDICIAL DETERMINATION OF PROBABLE CAUSE TO DETAIN

Name of Arrestee: _____

Date of Birth: _____ Present Location: _____

Arresting Agency: _____ CN#: _____

Date of Arrest: _____ Time of Arrest: _____

Offense(s): _____

Facts constituting probable cause to believe a crime was committed and arrestee committed it: _____

Yes No Was a prior application for probable cause to detain this person submitted to the court.

If so, explain: _____

I have contacted the prosecuting attorney, (name) who approved this Application for Judicial Determination of Probable Cause to Detain.

I have attempted to contact the prosecuting attorney to approve this application and have been unable to do so for the following reasons:

The Complainant, being duly sworn, swears the above facts are true and correct to the best of Complainant's knowledge and belief and constitute probable cause to believe that the above-named arrestee committed the offense(s) described herein.

Complainant's Signature: _____

Agency: _____ Time: _____

Subscribed and sworn to before me this __ day of _____, 19__.

Judge, Judicial Officer, Clerk or Notary Public

APPROVAL OF PROSECUTING ATTORNEY

_____, being duly authorized to prosecute the offense(s) specified in the attached Application, hereby approves this Application for Judicial Determination of Probable Cause to Detain.

Date and time: _____ (signature) _____
Name
Office

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1993.)

FORM 45

STATE OF MINNESOTA COUNTY OF _____ DISTRICT COURT

JUDICIAL DETERMINATION OF PROBABLE CAUSE TO DETAIN

Name of Arrestee: _____

Date of Birth: _____ Present Location: _____

Arresting Agency: _____ CN#: _____

Date of Arrest: _____ Time of Arrest: _____

Facts submitted by written application and sworn affidavit?

___ Yes ___ No

Facts submitted orally upon oath?

___ Yes ___ No

Application approved by prosecuting attorney?

___ Yes ___ No

FROM THE SWORN FACTS SUBMITTED TO THE COURT

IT IS DETERMINED:

- ___ that the application to detain was timely presented to the court.
- ___ that the application to detain was not timely presented to the court and the above-described arrestee shall be released immediately.
- ___ that no probable cause exists to detain the above-described arrestee and said arrestee shall be released immediately.
- ___ that probable cause exists to detain the above-described arrestee for the offense(s) of

It is hereby ordered that said arrestee be detained subject to the requirements of the Minnesota Rules of Criminal Procedure and further order of this court.

___ that bail without other conditions of release is set in the amount of _____

___ that other conditions of release, with or without bail, are established as follows: _____

___ that the prosecuting attorney authorized to prosecute the offense(s) specified in the Application is unavailable to approve the application and the determination as to probable cause should not be delayed.

The proceeding was submitted: [] in writing [] in person
[] telephonically [] by FAX

DATE: _____ TIME: _____

Judge or Judicial Officer

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1993.)

FORM 46

STATE OF MINNESOTA COUNTY OF _____ DISTRICT COURT

NOTICE OF JUDICIAL DETERMINATION OF PROBABLE CAUSE TO DETAIN

Name of Arrestee: _____

Date of Birth: _____ Present Location: _____

Arresting Agency: _____ CN#: _____

Date of Arrest: _____ Time of Arrest: _____

You, (name of arrestee), are hereby notified that at (time) on (date), Judge/Judicial Officer (name) reviewed whether there was probable cause to detain you fur-

ther pending your first court appearance and determined:

- ___ that the application to detain was timely presented to the court.
- ___ that the application to detain was not timely presented to the court and you shall be released immediately.
- ___ that no probable cause exists to detain you further and that you shall be released immediately.
- ___ that probable cause exists to detain you for the offense(s) of

pending your appearance in court or the posting of any bail that may have been set.

- ___ that bail without other conditions of release is set in the amount of

- ___ that other conditions of release, with or without bail, are established as follows:

The facts upon which this determination was made were submitted:

- ___ by written application and sworn affidavit.
- ___ orally upon oath.

Date and time notice given: _____

(name of person giving notice)

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1993.)

[For text of Mandatory Felony and Gross Misdemeanor Complaint and Indictment Forms and Table of Superseded Statutes, see M.S. 1992, Volume 9]

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