

## The probable cause required to effect an arrest is substantially different from and less stringent than the probable cause needed to bind a defendant over for trial

31. August 2011 By Jeanne Long

On August 30, 2011, the Michigan Court of Appeals approved for publication its opinion in *Michigan v Cohen*, No 298076. There, the Court held that the probable cause needed to effectuate an arrest is different from, and less stringent than, the the probable cause needed to bind over a defendant for trial.

In *Cohen*, the defendant was a passenger in a car that was pulled over. In plain sight between the defendant and the driver was a digital scale and a clear plastic measuring cup that had a white residue, which field-tested positive for cocaine. The defendant and the driver were arrested for joint constructive possession of the drug paraphernalia and residue. After being transported to the station, the defendant attempted to dispose of a 25-gram rock of cocaine by throwing it in the toilet, but it was recovered by the police.

The prosecutor charged the defendant with possession with intent to deliver less than 50 grams of cocaine (for the rock he threw into the jail-cell toilet) and possession of less than 25 grams of cocaine (for the cocaine residue on the scale). At the preliminary examination, the district court bound defendant over for trial on the possession with intent to deliver charge, but the court dismissed the simple possession charge on the ground that it was not convinced that the measuring cup and its contents belonged to the defendant.

The defendant filed a motion to quash. He did not challenge the district court's decision to bind him over on the charge of possession with intent to deliver. Instead, he contended that the court's determination with regard to the cocaine residue demonstrated that the police had lacked probable cause to arrest him, and accordingly, that the evidence discovered as a result of that arrest must be suppressed.

The circuit court agreed that in the absence of probable cause to bind defendant over on the simple possession charge, the police lacked probable cause for his arrest. The circuit court therefore dismissed the remaining charge of possession with intent to deliver cocaine.

On appeal, the Court of Appeals reversed and remanded. It held that the probable cause needed to support an arrest is not equivalent to the probable cause needed to bind a defendant over for trial, and, accordingly, that the trial court's determination that there was insufficient probable cause to bind the defendant over did not necessarily mean that the police had lacked probable cause to arrest. As explained by the Court, the purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it. At that stage, the prosecution must present "enough evidence on each element of the charged offense to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of [the defendant's] guilt." Probable cause to effectuate an arrest, however, is gauged

differently. “Probable cause to arrest exists where the facts and circumstances within an officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” This probable cause standard “is a practical, nontechnical conception” judged from the totality of the circumstances before the arresting officers. In short, the probable cause needed to bind over a defendant is greater than the probable cause needed to arrest. The Court held that the two standards are distinct, and because the bind-over standard is greater, its nullification alone is not sufficient to conclude the arresting officer lacked probable cause to arrest.