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Investigative alerts: smart policy or a way to skirt warrants?

Chicago’s little-understood “investigative alert” system has been in the news a lot in the past year. It was denounced by an appellate court judge as an “end run” around the Constitution and criticized in a news story as a way to “sidestep” civil liberties protections. “Critics: Police Sidestep Warrants,” Chicago Tribune (March 4, 2013). But what exactly are investigative alerts? Are they constitutional? And if so, are they smart policy?

The type of investigative alert we’re talking about is a searchable entry in a database which tells police officers that there’s probable cause to believe a suspect has committed a crime and that the suspect should be arrested if found.

If an officer comes upon an individual for whom an investigative alert is outstanding, the officer will arrest him even if he has no first-hand knowledge of the suspect’s criminal conduct and even if there is no outstanding warrant for his arrest. Prior to 2001, investigative alerts were called “stop orders.”

On its face, the investigative alert system looks constitutionally suspect. The Fourth Amendment presumes that arrests will be made with a valid arrest warrant.

As the Supreme Court explained in Wong Sun v. United States (1963), the warrant procedure ensures that “the deliberate, impartial judgment of the judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause.”

With the investigative alert system, even though there may be time to procure a warrant, the police instead make arrests without seeking judicial preapproval.

It’s for this reason that a 1st District justice wrote last year that the Chicago Police Department had “institutionalized an end run around the warrant requirement in the Constitution.” People v. Hyland, 981 N.E. 414, 427 (Ill. App. 2012) (Salone, J., concurring).

There is nonetheless every reason to accept that investigative alerts are, indeed, constitutional. Notwithstanding the presence of the warrants clause in the Fourth Amendment, the touchstone of constitutionality for a search or seizure is not whether the police have secured a warrant, but instead whether or not they have acted “reasonably.”

Authority for government agents to make warrantless arrests for felonies committed in their presence has deep roots in English common law.

We rightly accept that an officer who witnesses a serious crime committed in front of him is authorized to make an immediate arrest without first checking in with a judge. And with the advent of large, modern police forces, the courts have extended this authority — through the “fell officer” rule — to an officer who reasonably relies on the firsthand observations of other officers.

The investigative alert system is just an elaboration of the “fell officer” rule. So long as the information used to trigger an investigative alert is adequate to establish probable cause to arrest a suspect, an officer who relies on the investigative alert is acting reasonably and in accord with the Fourth Amendment. It’s unsurprising, therefore, that there have been no successful constitutional challenges to the system — or to similar systems in cities like New York or Los Angeles.

That said, there are many reasons why the system might be unwise as a matter of policy.

First, arrests made pursuant to an investigative alert instead of an arrest warrant are subject to more penetrating judicial review when later challenged in the context of a motion to suppress evidence gathered as a result of the arrest. The Supreme Court has noted that “the resolution of doubtful or marginal cases [of probable cause] should be largely determined by the preference to be accorded warrants.” United States v. Ventresca (1965). That means the prosecution loses at least a marginal advantage at a suppression hearing if officers relied on their own department’s probable cause determination, instead of first clearing the arrest with a judicial officer.

Second, if police are too easily allowed to skirt the warrant requirement — which requires a neutral judge to assess whether probable cause exists — there is every reason to expect they will misuse their arresting power.

Officers told the Chicago Tribune in March, for example, that investigative alerts allowed them to arrest suspects for whom they believe there is not enough evidence for prosecutors to file charges, but whom they are eager to question.

“Realistically, when we have these cases, we have very little, next to nothing,” a former homicide officer told the newspaper. If this officer is suggesting that investigative alerts authorize arrests where the evidence falls short of the probable cause required to be charged with a crime, then he is incorrect. And it is disturbing to think that an officer might conclude that the standard for arresting someone via an investigative alert is lower than that required for proceeding by warrant.

A third reason for questioning the wisdom of investigative alerts is that the system leaves Chicago exposed to damages claims for false arrest.

The Chicago Tribune discussed the case of a citizen who was arrested by officers who relied on an investigative alert indicating that the man had committed an armed robbery. It’s likely that the reason the officers did not approach a judge first is because they knew they had too little evidence for an arrest warrant.

After the defendant was acquitted at trial, he sued the city for false arrest — and won a settlement of $570,000.

Finally, by refusing to seek arrest warrants, Chicago police lose the ability to exploit state and federal databases that are designed to alert an officer whenever a person in his custody is a felon fleeing from another jurisdiction. Generally speaking, these databases will not accept information about suspects where no arrest warrant was first procured by police.

In sum, the constitutionality of the investigative alert system is beyond dispute, notwithstanding the understandable dismay about the system expressed by the concurring justices in Hyland. But there are some very good reasons for all of us to rethink its value.