South Carolina Law Review

Volume 21 | Issue 2 Article 7

1969

# Criminal Procedure--Search Warrants--For Informant's Tips to Establish Probable Cause Such Tips Must Meet Aguilar Standards Even When Partially Corroborated by Independent Investigation

Douglas McCullough

# COMMENTS

## CRIMINAL PROCEDURE—SEARCH WARRANTS—FOR INFORMANT'S TIPS TO ESTABLISH PROBABLE CAUSE SUCH TIPS MUST MEET AGUILAR STANDARDS EVEN WHEN PARTIALLY CORROBORATED BY INDEPENDENT INVESTIGATION*

In recent years the entire area of search and seizure has been subjected to closer scrutiny by reviewing courts. Beginning with the oft-noted[1] case of *Mapp v. Ohio*,[2] every case dealing with search and seizure has witnessed a further excursion of courts into a once-neglected area. Although *Ker v. California*[3] held that the states themselves could establish standards for determining the reasonableness of a search, subject to review only by the Supreme Court, *Aguilar v. Texas*[4] held the standards for obtaining search warrants to be the same under the fourth and fourteenth amendments. If a search was conducted under an invalid search warrant, and the situation was one in which a bona fide search warrant was obviously required, that search would be unreasonable.[5] It is difficult, moreover, to envision a situation in which a search could be found "reasonable" on review by the United States Supreme Court if the warrant which authorized the search were held invalid. Because the Supreme Court has an apparent desire for federal standards to control more areas of criminal procedure, the states[6] now appear to be bound under the new federal standards pertaining to the issuance of a search warrant set forth in *Spinelli v. United States*.[7]

* Spinelli v. United States, 89 S. Ct. 584 (1969).

1. *See* Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1961); Knowlton, *The Supreme Court, Mapp v. Ohio and Due Process of Law*, 49 IOWA L. REV. 14 (1963); Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407 (1961); Sloane & Leedes, *A Mapp for the Road Towards Exclusion*, 35 TEMP. L.Q. 27 (1961-62); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.
2. 367 U.S. 643 (1961).
3. 374 U.S. 23 (1963).
4. 378 U.S. 108 (1964).
5. *Cf.* Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964).
6. The federal standard for determination of probable cause was held to control the states. *See* Beck v. Ohio, 379 U.S. 89 (1964).
7. 89 S. Ct. 584 (1969).

Generally, with some exceptions,[8] a warrant is required to search private property.[9] The fourth amendment[10] requires that search warrants be issued only upon probable cause.[11] Unless arbitrary, the magistrate's finding that probable cause exists has been said to be conclusive.[12] In practice, however, this finding of probable cause is subject to considerable review if there is a trial.[13]

Probable cause has been said to have been sufficiently shown in an affidavit if a man of ordinary caution or prudence would be led to believe and would conscientiously entertain a strong suspicion that an offense has been committed or that the accused is guilty of an offense.[14] Although this is the typical judicial definition of probable cause, probable cause may sometimes be determined from the standpoint of the officer, with his special skill and knowledge, rather than from that of the ordinary citizen in the same situation.[15] Thus, a police officer may detect the odor of opium smoke, and due to his special ability to recognize such an odor, an inference may arise that illegal activity is occurring. Mere suspicion by the police, however, will not be

8. A search may be made without a warrant when: (1) there is a valid consent to the search, United States v. Dornblut, 261 F.2d 949 (2d Cir. 1958), *cert. denied,* 360 U.S. 912 (1959); *cf.* Abel v. United States, 362 U.S. 217 (1960); (2) the search is incident to a lawful arrest, Agnello v. United States, 269 U.S. 20 (1925); (3) there is an impending danger that requires immediate search, District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949). Such impending danger exists when: (a) evidence or contraband is threatened with removal or destruction, Johnson v. United States, 333 U.S. 10, 15 (1948) (dictum); Hernandez v. United States, 353 F.2d 624 (9th Cir. 1965); (b) a policeman responds to an emergency call for aid, McDonald v. United States, 353 U.S. 451, 454 (1948) (dictum); (c) for some other reason there can be no delay and a judge is unavailable, *cf.* Trupiano v. United States, 334 U.S. 699 (1948).

9. *See, e.g.,* Camara v. Municipal Court, 387 U.S. 523 (1967).

10. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

11. Probable cause is required for a search with or without a warrant. The standards for the determination of probable cause are no less stringent in both instances. *See* United States v. Peisner, 311 F.2d 94 (4th Cir. 1962); *cf.* Johnson v. United States, 333 U.S. 10 (1948).

12. Evans v. United States, 242 F.2d 534, 536 (6th Cir. 1957).

13. *See, e.g.,* Schoeneman v. United States, 317 F.2d 173 (D.C. Cir. 1963).

14. Brinegar v. United States, 338 U.S. 160 (1949).

15. United States v. Sebo, 101 F.2d 889, 890 (7th Cir. 1939).

enough to establish probable cause.[16] All the evidence within the officer's knowledge may be considered in the determination of probable cause, even though that evidence would not be admissible in a trial.[17] Thus, hearsay may be sufficient,[18] if it is corroborated by facts within the officer's personal knowledge which would lead him to credit the hearsay or cause a reasonably suspicious person to believe it to be true.[19]

Although the determination of probable cause is a broad, factual determination and decided cases are helpful in establishing guidelines only insofar as they present similar facts,[20] there are certain procedural steps with which the officer must always comply in order to obtain a search warrant.[21] For a search warrant to be issued, an affidavit which states facts sufficient to establish probable cause must be submitted.[22] If the validity of

16. Aguilar v. Texas, 378 U.S. 108 (1964); Brinegar v. United States, 338 U.S. 160 (1949); Nathanson v. United States, 290 U.S. 41 (1933); United States v. Dixon, 334 F.2d 322 (6th Cir. 1964); United States v. Pepe, 209 F. Supp. 329 (D. Del. 1962).

17. Draper v. United States, 358 U.S. 307 (1959). In light of the statement that probable cause is "substantially" the same for an arrest warrant as for a search warrant in Giordenello v. United States, 357 U.S. 480 (1958), one wonders whether instances giving rise to probable cause to arrest can be the basis for probable cause sufficient to justify the issuance of a search warrant. Some possible factors in this area are: 1. Geographical area (defendant was recognized by police while traveling from a known source of supply of illegal liquor toward a probable illicit market) Carroll v. United States, 267 U.S. 132 (1925). 2. Previous criminal activity (officer's knowledge of past criminal activity when coupled with credible informant's tip and subsequent fleeing of defendant gave rise to probable cause) Husty v. United States, 282 U.S. 694 (1931). 3. Furtive conduct (defendant's fleeing *may* be sufficient corroboration of hearsay informant's tip to give probable cause) Wong Sun v. United States, 371 U.S. 471 (1963). 4. Sense impressions: (a) Sight of illegal activity or contraband obviously gives probable cause; (b) smell (not sufficient when it alone is relied on in illegal whiskey cases) Chapman v. United States, 365 U.S. 610 (1961); but smell may be sufficient in other situations (officers smelled opium smoke, but arrest was invalidated on hypertechnical grounds that, at time of entry, officers did not have probable cause to suspect the defendant specifically, since they were unaware of the number and identity of the occupants) Johnson v. United States, 333 U.S. 10 (1948); (c) hearing (rejected in one case when officers heard the sound of adding machines through the window of a suspected lottery operator) McDonald v. United States, 335 U.S. 451 (1948).

18. Jones v. United States, 362 U.S. 257 (1960).

19. United States v. Ventresca, 380 U.S. 102, 110 (1965).

20. United States v. Ramirez, 279 F.2d 712, 714 (2d Cir.), *cert. denied*, 364 U.S. 850 (1960).

21. It has long been established that a magistrate is to make the determination of probable cause necessary for a search and not the officer involved in the detection of the crime. Johnson v. United States, 333 U.S. 10 (1948).

22. *See generally* FED. R. CRIM. P. 41(b); S.C. CODE ANN. §§ 4-414, -415 (1962). For an excellent discussion of the status of search and seizure in South Carolina, *see also* Note, *Search and Seizure—A Constitutional Standard for South Carolina*, 17 S.C.L. REV. 687 (1965).

an affidavit is questioned, it cannot be upheld on grounds of subsequent or extrinsic evidence, but must be justified on its face.[23] The Supreme Court has established guidelines to aid in determining whether these procedural steps have been properly followed. The landmark case of *Aguilar v. Texas*[24] delineates the two important guidelines for the determination of probable cause, when the basis for probable cause is an informant's tip.

In *Aguilar*, the Court held that an affidavit based on an informer's tip which is conclusory in nature cannot, in itself, be the basis for probable cause.[25] The conclusory affidavit[26] in *Aguilar* was deemed inadequate on what was described in *Spinelli*, as a "two-pronged" test. The affidavit was inadequate because, first, it failed to set forth any of the underlying circumstances necessary to enable the magistrate to judge the validity of the informant's conclusion, and secondly, it disclosed no basis for the affiant's belief that the informant was a credible person or that his information was reliable.

Although adhering to *Aguilar* in principle, many courts have used a "totality of the circumstances" approach to justify determinations of probable cause.[27] Under this view, probable cause may arise from the "totality" of the facts disclosed in an affidavit, even though each allegation, in itself, would be insufficient to establish probable cause. On this basis the Eighth Circuit justified the search which led to the conviction of William Spinelli.[28]

William Spinelli was convicted of violating Title 18, Section 1952, of the United States Code, by engaging in travel from an

23. This has been called the "Four-Corners Doctrine." Giordenello v. United States, 357 U.S. 480 (1958); Baysden v. United States, 271 F.2d 325 (4th Cir. 1959); United States v. Sims, 201 F. Supp. 405 (M.D. Tenn. 1962).

24. 378 U.S. 108 (1964).

25. *Accord,* State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967); State v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964).

26. The relevant portion of the affidavit in *Aguilar* stated that:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.

378 U.S. at 109.

27. United States v. Pinkerman, 374 F.2d 988 (4th Cir. 1967); United States v. Whiting, 311 F.2d 191 (4th Cir. 1962), *cert. denied,* 372 U.S. 935 (1963); United States v. Joseph, 278 F.2d 504 (3d Cir. 1960); United States v. Delia, 283 F. Supp. 470 (E.D. Pa. 1968); United States v. Lewis, 270 F. Supp. 807 (S.D.N.Y. 1967); Commonwealth v. Brown, 237 N.E.2d 53 (Mass. 1968).

28. Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967).

Illinois suburb to St. Louis, Missouri, with the intention of conducting illegal gambling activities. Spinelli challenged the constitutionality of the search warrant which authorized the search that uncovered the evidence necessary for his conviction. The affidavit alleged that: (1) Spinelli was observed on more than one occasion entering St. Louis, Missouri, from Illinois, parking at an apartment house and entering a particular apartment; (2) telephone company records indicated that the telephones within the apartment were listed in the name of Grace P. Hagen and had the numbers WY 4-0029 and WY 4-0136; (3) Spinelli was a known gambler and associate of gamblers; (4) the FBI was informed by a confidential, reliable informant that Spinelli was operating a bookmaking establishment by means of two telephones numbered WY 4-0029 and WY 4-0136. The United States Supreme Court held that these facts did not give rise to probable cause and that the search warrant was improperly issued.

In *Spinelli v. United States*,[29] the Court was dealing with a new, but not completely unforseen[30] problem of the weight to be accorded conclusory statements of an informant's tip when these statements are partially corroborated by an independent investigation.[31] In reviewing this problem the Court held that the "totality of the circumstances" approach was too broad and that

> [a] magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informant's tip which—even when partially corroborated — is not as reliable as one which passes *Aguilar's* requirements when standing alone.[32]

Thus, an informant's tip, when presented in a conclusory affidavit, cannot be the basis for a warrant to be issued—even when partially corroborated by an independent investigation—

29. 89 S. Ct. 584 (1969).
30. It was generally recognized that some corroboration of the informant's statements was needed. It was not generally recognized that an independent investigation which only partially corroborated conclusionary statements by an informant would not be sufficient to establish probable cause. *See generally* Comment, *The Federal Standard—The New State Law of Search and Seizure*, 19 ARK. L. REV. 329, 332 (1966); Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts*, 53 CALIF. L. REV. 840 (1965).
31. In *Aguilar* the Court noted that if the conclusory statements in the affidavit had been buttressed by "the facts and results of . . . a surveillance [independent investigation] . . . this would, of course, present an entirely different case." 378 U.S. at 109 n.1.
32. 89 S. Ct. at 589.

unless the other allegations in the affidavit independently establish probable cause or the tip meets *Aguilar* standards. The question then arises, what standards are set forth in *Aguilar*? The Court stated that one purpose of *Spinelli* is to clarify the requirements of *Aguilar*. The Court then outlined what standards a reviewing magistrate should follow when receiving an affidavit in which probable cause is based in part on an informant's tip.

For an informant's tip to establish probable cause, first and most importantly, some of the underlying circumstances which would enable the magistrate to judge the validity of the informant's conclusion must be set forth. This is the first prong of the two-pronged test of *Aguilar*. If this prong is to be complied with, there must be some evidence that the informant has observed the illegal conduct himself, or that he has heard of the conduct from the guilty party or from someone who is also likely to know of the illegal activity.[33]

For the second prong of *Aguilar* to be complied with, there must be some evidence to support the affiant's belief that the informant is a credible person and his information reliable. It appears that these requirements may be met if the affiant discloses that the informant's information has been reliable in the past. When the informant is new and the tip in question is his first, then this requirement may be somewhat of an obstacle. For the most part, however, the credibility of the informant will generally be proven by a sworn statement of past reliability and will constitute no particular obstacle to the issuance of a search warrant.

The two-pronged test of reliability of the informant and underlying circumstances on which the conclusion is based, may sometimes be met if there is such a specificity of detail that the magistrate could reasonably infer that the conclusion is sound.

33. Whether this requirement of detail will affect the ability of police to use informants, particularly in the area of narcotics and gambling violations, is presently unknown. It can be suggested that there will be an increasing unwillingness on the part of informants to divulge such detailed information. Once the facts set out in the affidavit are made known to the defendant, it is very likely that the defendant would then be able to ascertain who "squealed." It would be naive to deny that in some instances there would be severe reprisals against the informant, either by the defendant himself, or other underworld associates.

Justice Harlan, in the majority opinion,[34] pointed out that for the purpose of establishing probable cause, for an arrest or a search, *Draper v. United States*[35] provides an example of the type of detailed information required.

In *Draper*, an informant named Hereford stated to police officers that Draper would return to Denver on a certain train bringing narcotics with him. Hereford then described with great particularity how Draper would be dressed without stating how he had obtained his information. This information was said to give rise to probable cause for an arrest and therefore the subsequent search was valid.[36]

Tht facts of *Draper* are similar to those of *McCray v. Illinois*.[37] In *McCray* police officers were told by an informant that McCray had heroin on his person and could be found in the vicinity of 47th Street and Calumet Avenue in Chicago. The officers proceeded to that area, found and arrested McCray, and the search incident to the arrest uncovered heroin. At the hearing on the motion to suppress the evidence, the arresting officers testified that the informant involved had enabled them to attain 15 or 16 convictions. On this basis the United States Supreme Court concluded that, "[t]here can be no doubt, upon the basis of the circumstances related . . . that there was probable cause to sustain the arrest and incidental search in this case."[38]

These cases illustrate that personal opinion intertwined with factual analysis is used in the determination of probable cause. This use of personal opinion and factual analysis was under-

34. The *Spinelli* decision is unusual in several notable aspects. The Court split 5-3 (Justice Marshall abstained) and Justice White voted with the majority only to avoid an affirmance due to an equally divided court. In dissent were Justices Black and Fortas, which, due to their differing constitutional philosophies, is most unusual. Finally, the majority opinion was written by Justice Harlan and seems to be antithetical to his own constitutional views. For a discussion of Justice Harlan's constitutional philosophy in this area, see Ledbetter, *Mr. Justice Harlan: Due Process and Civil Liberties*, 20 S.C.L. REV. 389 (1968).

35. 358 U.S. 307 (1959).

36. It is interesting to note that the Court has often demanded more evidence to establish probable cause for officers working without a warrant than is necessary to justify the issuance of a warrant. *See* Johnson v. United States, 333 U.S. 10 (1948). This has been described as evincing the Court's preference for officers working with a warrant. United States v. Ventresca, 380 U.S. 102, 106 (1965).

37. 386 U.S. 300 (1967).

38. *Id.* at 304.

scored in *Spinelli* by the conclusion of dissenting Justice Fortas that, "such facts and circumstances are present in this case . . . ."[39] Justice Black, also in dissent, stated his views more strongly. He believed *Spinelli* to be a departure from past principles laid down in former cases, notably *United States v. Ventresca*.[40] In that decision the Court stated:

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common sense and realistic fashion . . . . Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.[41]

In *Spinelli*, the Supreme Court has re-emphasized its often taken position that the determination of probable cause is not to be made by the police officer, but shall be made by a magistrate. The magistrate is to form a protective barrier between the citizen and the police, thereby insuring that the citizen's constitutional rights will be fully recognized and protected. These rights are not protected when the magistrate is a mere rubber stamp for the police. In *Spinelli*, the Court has reavowed that this goal will be reached.

There can be no doubt that in the future, for a search warrant's issuance to be upheld, the police must have presented sufficient evidence in the affidavit to enable a magistrate to determine that probable cause exists. The fruits of the search warrant cannot be used to validate the existence of probable cause sufficient to justify the issuance of a warrant. Therefore, when the basis for probable cause is an informant's tip, there must be compliance with the two-pronged test of *Aguilar*. Some of the underlying facts and circumstances from which the informant concluded that an offense was committed must be made available to the magistrate, and the affiant must state why the informant is thought by the police to be reliable. If this test is not complied with, the other allegations in the affidavit must independently give rise to probable cause.[42] In any event it

39. Spinelli v. United States, 89 S. Ct. 584, 600 (1969) (dissenting opinion).
40. 380 U.S. 102 (1965).
41. *Id.* at 108.
42. If other allegations in a search warrant affidavit give rise to probable cause, then conclusory statements of the informant may be disregarded as surplusage. *See* United States v. Whiting, 311 F.2d 191 (4th Cir. 1962), *cert. denied*, 372 U.S. 935 (1963).

appears that the Supreme Court has deemed that the "totality of the circumstances" approach is not a precise enough analysis of the facts and is not to be used to determine the existence of probable cause in these circumstances.

The *Spinelli* decision can be viewed as requiring increasing specificity of detail when an informant's tip is to be the basis for probable cause and the issuance of a warrant, or an arrest without a warrant. Whether this decision evinces such a "negative attitude by reviewing courts [as] will tend to discourage police officers from submitting their evidence to a judicial officer before acting,"[43] is a question that cannot be presently answered.[44]

DOUGLAS MCCULLOUGH

43. United States v. Ventresca, 380 U.S. 102, 108 (1965).

44. There is some evidence that present police practice does not reflect the judicial preference for search warrants that courts express. In Detroit (1956-63), there were 288 search warrants of which 244 were used to obtain gambling paraphernalia. This data suggests that police only use search warrants when it gives them a unique advantage. Otherwise they concentrate on the search incident to a lawful arrest. L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, DETECTION OF CRIME 101-02 (1967).