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The Role of Eyewitness Accounts in Establishing Probable Cause for the Issuance of Search Warrants

The Role of Eyewitness Accounts in Establishing Probable Cause for the Issuance of Search Warrants—*Manley v. Commonwealth*

The legality of entry gained through the use of a search warrant is dependent upon the legality of the means used to obtain the warrant.[1] To justify the issuance of a search warrant the affiant must show the existence of probable cause.[2]

Probable cause may be shown by the use of information supplied by informants.[3] The courts have, however, in permitting the use of such

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[1] *See, e.g.*, McCreary v. Sigler, 406 F.2d 1264 (8th Cir. 1969).

[2] *See, e.g.*, Aguilar v. Texas, 378 U.S. 108 (1964); Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925); Hanger v. United States, 428 F.2d 746 (8th Cir. 1970); Oliver v. State, — Ala. App. —, 238 So. 2d 916 (1970); People v. Rogers, 15 N.Y.2d 422, 208 N.E.2d 168, 260 N.Y.S.2d 433 (1965).

Though the United States Constitution provides that warrants will issue only where probable cause has been shown, it gives no indication of what is necessary to show probable cause. *See generally* Note, *Testing the Factual Basis for a Search Warrant*, 67 COLUM. L. REV. 1529 (1967).

> 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.

See Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962). In this case is one of the most widely accepted definitions of probable cause. The court stated:

> . . . .
> Probable cause exists where the facts and circumstances within the officer's knowledge, and of which he had 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. *Id.* at 320.

While probable cause may be shown by evidence insufficient to justify conviction, it must consist of more than mere suspicion or rumor. United States v. Ventresca, 380 U.S. 102 (1965).

[3] *See, e.g.*, United States v. Ventresca, 380 U.S. 102 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Rugendorf v. United States, 376 U.S. 528 (1964); United States v. Gray, 429 F.2d 1323 (4th Cir. 1970); Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966); United States v. Manetti, 309 F. Supp. 174 (D. Del. 1970); Oliver v. State, — Ala. App. —, 238 So. 2d 916 (1970); People v. Schmidt, — Colo. —, 473 P. 2d 698 (1970); Ward v. State, 9 Md. App. 583, 267 A.2d 255 (1970). *Contra*, Ferry v. State, — Ind. —, 262 N.E.2d 523 (1970).

For a discussion of informers, the history of informer activity and informer privilege, *see* 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Quinn, *McCray v. Illinois: Probable Cause and the Informer Privilege*, 45 DEN. L.J. 399 (1968); Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206 (1953).

hearsay, required that the officer making application provide a substantial basis for crediting the hearsay.[4]

To test the sufficiency of an affidavit based totally or in part on hearsay the "two-pronged test" of *Aguilar v. Texas* has been followed by the overwhelming majority of American jurisdictions.[5] The *Aguilar* test[6] requires that to show probable cause the affiant making application must (1) provide the "underlying circumstances" necessary for a magistrate to determine how the informant arrived at his conclusions, and (2) show that the informant is credible or that the information given by him can be relied on.

In *Manley v. Commonwealth*[7] the Virginia Supreme Court of Appeals held that an informant's statement of facts as an "eyewitness" fulfilled both of *Aguilar's* requirements, and was therefore sufficient to show probable cause for the issuance of a search warrant.[8] The affidavit was based

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[4] *See, e.g.*, United States v. Ventresca, 380 U.S. 102 (1965); Rugendorf v. United States, 376 U.S. 528 (1964); Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959); United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); United States v. Meeks, 313 F.2d 464 (6th Cir. 1963); United States v. Wood, 270 F. Supp. 936 (S.D.N.Y. 1967); State *ex rel.* Attorney General v. State, — Ala. —, 237 So. 2d 640 (1970); People v. Perlman, — Ill. App. 2d —, 262 N.E.2d 253 (1970). *Accord,* United States v. Simon, 409 F.2d 474 (7th Cir. 1969); Coyne v. Watson, 282 F. Supp. 235 (S.D. Ohio, 1967).

See generally Comment, *Informer's Word as The Basis for Probable Cause in the Federal Courts,* 53 CALIF. L. REV. 840 (1965); Note, *The Informer's Tip as Probable Cause for Search or Arrest,* 54 CORNELL L. REV. 958 (1969); 1967 DUKE L.J. 888.

[5] *See, e.g.*, Hanger v. United States, 428 F. 2d 746 (8th Cir. 1970); United States *ex rel.* Kislin v. New Jersey, 429 F.2d 950 (3d Cir. 1970); Oliver v. State, — Ala. App. —, 238 So. 2d 916 (1970); State v. Castro, — Ariz. App. —, 475 P.2d 725 (1970); State v. Toce, 6 Conn. Cir. 192, 269 A.2d 421 (1969); People v. Perlman, — Ill. App. 2d —, 262 N.E.2d 253 (1970); People v. Massey, 38 Misc. 2d 403, 238 N.Y.S.2d 531 (1963); Commonwealth v. Robinson, — Pa. Super. —, 269 A.2d 332 (1970).

[6] Aguilar v. Texas, 378 U.S. 108 (1964). The Court stated:

> [T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable".

Id. at 114.

Though it left the wording of the *Aguilar* test intact, *Spinelli v. United States,* 393 U.S. 410 (1969), decided five years later, gave further clarification and refinement to the principles of *Aguilar.* For a discussion of *Spinelli's* treatment of *Aguilar, see* Note, *The Informer's Tip as Probable Cause for Search or Arrest,* 54 CORNELL L. REV. 958 (1969).

[7] 211 Va. 146, 176 S.E.2d 309 (1970).

[8] In reference to the first element the court stated:

> Clearly the affidavit in the instant case satisfies *Aguilar's* first requirement of the test. The informant's information was based on personal observation and participation in the defendant's illegal activity. The neutral and detached justice

solely upon information supplied by an unnamed informant who stated that he had not only observed marijuana in the apartment to be searched, but also had bought some from the defendant and had smoked it there.[9]

Although earlier decisions showed a reluctance to find probable cause where a warrant was not based on the personal knowledge or perception of the affiant,[10] many dealt favorably with warrants based on the personal experience of an informant.[11] More recently, despite the host of facts used to reinforce affidavits,[12] the courts have attached significant

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of the peace could thus conclude that the allegations were based on facts, not suspicion or rumor. Manley v. Commonwealth, 211 Va. 146, 150, 176 S.E.2d 309, 313 (1970).

The court's reference to participation by the informant in the illegal activity raises some question as to the weight the court attaches to the personal observation with regard to the first element. For the court's treatment of the second element, *see* note 14 *infra.*

In concluding that probable cause had been shown the court gave considerable weight to the fact that the informant was making an admission against interest, and that his information was detailed in nature.

[9] 211 Va. at 147-148, 176 S.E.2d at 311 (1970). The relevant portion of the affidavit as reprinted by the court was as follows:

> The material facts constituting probable cause for issuance of the search warrant. I have received information from a reliable informant who states that he was at the apartment of Melvin Lloyd Manley, 313 West 27th Street, this past week and he saw a large quantity of marijuana (a narcotic drug) in a chest in the front room and also some marijuana was in a dresser drawer in the middle room. My informer also states that in the past month he has smoked marijuana in the apartment . . . and . . . has made two purchases of marijuana from Melvin Lloyd Manley.

[10] In earlier decisions an affidavit not based on the personal knowledge or perception of the affiant was said to be founded on "information and belief." This fact alone did not make the affidavit insufficient; rather, the failure to allege facts supporting the information was considered a fatal flaw. *See, e.g.,* United States v. Clark, 18 F.2d 442 (D. Mont. 1927); People v. Billerbeck, 323 Ill. 48, 153 N.E. 586 (1926); Kranik v. State, 204 Ind. 661, 185 N.E. 514 (1933); Drake v. State, 201 Ind. 235, 165 N.E. 757 (1929); Fugitt v. Commonwealth, 220 Ky. 768, 295 S.W. 1072 (1927); Standard v. State, 113 Tex. Crim. 600, 21 S.W.2d 1066 (1929).

[11] *See, e.g.,* Turk v. State, 89 Ind. App. 30, 165 N.E. 558 (1929); Foley v. Commonwealth, 228 Ky. 691, 15 S.W.2d 444 (1929); Denzlinger v. State, — Tex. Crim. —, 28 S.W.2d 160 (1930). *Accord,* Litteral v. Commonwealth, 230 Ky. 573, 20 S.W.2d 457 (1929), where the court, holding information from an unnamed informant insufficient, indicated that probable cause could exist only where the informant was identified.

[12] The use of various corroborating facts in recent decisions involving personal observation by informants has resulted in uncertainty as to the significance these courts have attached to the fact that the informant was relating facts as an "eyewitness." Invariably all the facts are considered together as constituting probable cause with little elaboration on any one particular factor. *See, e.g.,* Rugendorf v. United States, 376 U.S. 528 (1964) (furs described in detail by informant matched only furs stolen in past six months); Jones v. United States, 362 U.S. 257 (1960) (petitioner was

weight to the fact that an affidavit was based on the personal observation of an informant.[13]

Though void of any reasoning to support its conclusion, *Manley* states that informant reliability may be established by the informant's statement of facts as an "eyewitness."[14] Such a result is clearly contrary to both reason

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admitted drug user, and the informant had made an admission against interest); United States *ex rel.* Kislin v. New Jersey, 429 F.2d 950 (3d Cir. 1970) (information corroborated by surveillance by officers); United States v. Wood, 270 F. Supp. 963 (S.D.N.Y. 1967) (serial numbers given by informant corresponded to those on typewriters recently stolen). *But see* Coyne v. Watson, 282 F. Supp. 235 (S.D. Ohio 1967), which held that the description of an informer as an "eyewitness" gave strong evidence for a magistrate to conclude that probable cause existed.

[13] *See, e.g.*, United States *ex rel.* Kislin v. New Jersey, 429 F.2d 950 (3d Cir. 1970); United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970); Reynolds v. State, — Ala. App. —, 238 So. 2d 557 (1970); People v. Akers, 9 Cal. App. 3d 96, — P.2d —, 87 Cal. Rptr. 903 (1970); People v. Peppers, — Colo. —, 475 P. 2d 337 (1970); People v. Mitchell, 45 Ill. 2d 148, 258 N.E.2d 345 (1970). *But see* Holt v. State, 471 P.2d 957 (Okla. Crim. 1970), where it was held that an affidavit based solely on information by an unnamed informant who purported to have personal knowledge did not show probable cause.

[14] 211 Va. at 150, 176 S.E.2d at 313. The court stated:

> [T]he credibility of the informer or the reliability of his information may be shown in other ways. Reliability may be found in an informant's statement of facts as an "eyewitness."

The above material is the only treatment given this matter by the court. To ascertain the reasoning used to arrive at this conclusion reference must be made to the argument of the Commonwealth. The similarities between the court's opinion and the Commonwealth's brief indicate that the court closely followed the latter. The Commonwealh bases its argument that informant reliability is established by the statement of facts as an "eyewitness" on a broad construction of the disjunctive phraseology of the second element of *Aguilar*. This phraseology requires that the affiant show that the ". . . informant was 'credible' *or* his information 'reliable'" (emphasis added). Aguilar v. Texas, 378 U.S. 108, 114 (1964). The Commonwealth maintained that this disjunctive phraseology permits the use of collateral material such as eyewitness accounts to establish informant reliability. Brief for Commonwealth at 12-14, Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309 (1970). Such a construction is totally beyond that intended by *Aguilar*, and later *Spinelli*. Examination of *Spinelli*, particularly the concurring opinion of Mr. Justice White, Spinelli v. United States, 393 U.S. 410, 423 (1969), discloses that a narrow application of the phrase ". . . or his information 'reliable'" was intended. The Court intended that this phraseology refer to instances where the informant's information had been independently corroborated. The corroboration could be by officers or by other means.

In *Manley* two principals were presented on which to determine reliability. In addition to the "eyewitness" character of the informer, the court discussed "admission against interest" as another basis for ascertaining reliability. The court's language implied, however, that the first basis alone was sufficient to establish reliability. 211 Va. at 151, 176 S.E.2d at 313.

and the decisions following the *Aguilar* test.[15] Those decisions which have dealt with eyewitness accounts have not used them to establish informant reliability, but rather to fulfill *Aguilar's* first element.[16] These decisions have used various other averments to establish the informant's reliability.[17]

In attempting to determine an informant's reliability the neutral magistrate is equipped only with those facts supplied by the affiant-officer.[18] Because the facts in question are usually conveyed to the magistrate by

[15] *See* United States *ex rel.* Kislin v. New Jersey, 429 F.2d 950 (3d Cir. 1970); People v. Tillman, 238 Cal. App. 2d 134, 47 Cal. Rptr. 614 (1965). *See also* Spinelli v. United States, 393 U.S. 410 (1969); United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970); United States v. Freeman, 358 F.2d 459 (2d Cir. 1966); United States v. Wood, 270 F. Supp. 963 (S.D.N.Y. 1967); People v. Akers, 9 Cal. App. 3d 96, — P.2d —, 87 Cal. Rptr. 903 (1970); People v. Schmidt, — Colo. —, 473 P.2d 698 (1970); People v. Mitchell, 45 Ill. 2d 148, 258 N.E.2d 345 (1970); People v. Perlman, — Ill. App. 2d —, 262, N.E.2d 253 (1970); People v. Asaro, — App. Div. 2d —, — N.E.2d —, 312 N.Y.S.2d 807 (1970); *cf.* State v. White, — Ariz. App. —, 475 P.2d 750 (1970). *But see* McCreary v. Sigler, 406 F.2d 1264 (8th Cir. 1969); Coyne v. Watson, 282 F. Supp. 235 (S.D. Ohio 1967).

Mr. Justice Gordon in his concurring opinion in *Manley* stated in reference to the court's language that an informant's statement of facts as an "eyewitness" may establish reliability, that ". . . reason militates against such a conclusion." 211 Va. 146, 152, 176 S.E.2d 309, 314 (1970) (concurring opinion). Justice Gordon concurred in the result because he felt the informer's reliability had been established by his admission against interest.

[16] *See* cases cited note 15 *supra*.

Mr. Justice White, concurring in Spinelli v. United States, 393 U.S. 410, 425 (1970), gives a clear indication of the role the court intended informant eyewitness accounts to play in the *Aguilar* test. Justice White stated:

> If the affidavit rests on hearsay—an informant's report—what is necessary under *Aguilar* is one of two things: the informant must declare . . . that he has himself seen or perceived the fact or facts asserted . . . . since the report, although hearsay, purports to be first-hand observation, remaining doubt centers on the honesty of the informant, and that worry is dissipated by the officer's previous experience with the informant.

[17] The most frequently used averment has been that the informant has supplied information in the past which was proven credible or resulted in conviction. *See, e.g.,* Rugendorf v. United States, 376 U.S. 528 (1964); People v. Peppers, — Colo. —, 475 P.2d 337 (1970); Merritt v. State, — Ga. App. —, 175 S.E.2d 890 (1970), People v. Bryant, — Ill. App. 2d —, 261 N.E.2d 815 (1970). For other allegations frequently used to support reliability *see, e.g.,* United States *ex rel.* Kislin v. New Jersey, 429 F.2d 950 (3d Cir. 1970) (independent surveillance made by police); United States v. Castle, 213 F. Supp. 56 (D.C.C. 1962) (where the informant's allegations constituted an admission against interest); Johnson v. State, 121 Ga. App. 477, 174 S.E.2d 246 (1970) (informant was a government agent.); People v. Montague, 19 N.Y.2d 121, 224 N.E.2d 873, 278 N.Y.S.2d 372 (1967) (informant turned over to police marijuana he obtained from the defendant).

[18] *See, e.g.,* People v. Peppers, — Colo. —, 475 P.2d 337 (1970); People v. Baird, — Colo. —, 470 P.2d 20 (1970).

the affiant, it is rare that an informant has any personal contact with the magistrate.[19] On the contrary, frequently, as in *Manley,* the magistrate does not even know the identity of the informant.[20] Undoubtedly under such circumstances the imagination of a magistrate would be taxed to conclude that the informant was truthful in his accusations simply because he has supplied facts alleging that they were the product of his personal observations.

The fact that many nameless informers have at some time been engaged in some form of illegal activity further illustrates the unreasonableness of the court's conclusion.[21] The very nature of an informer's activities and associations leaves his credibility subject to doubt.[22] There are countless reasons why an informer would concoct a totally fallacious accusation.[23] If *Manley's* "eyewitness" conclusion were followed, such an accusation could become the basis for the issuance of a search warrant.

Certainly *Manley* was justified in using an eyewitness account to fulfill *Aguilar's* first element.[24] This portion of the test is designed to insure

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[19] *See, e.g.,* Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts,* 53 CALIF. L. REV. 840, 841 (1965).

[20] For cases and discussion of the informer's privilege of nondisclosure and the problems encountered by the use of undisclosed informer's, *see* 8 WIGMORE, *supra* note 3; Annot., 76 A.L.R.2d 262, 271 (1961); Note, *Testing the Factual Basis for a Search Warrant,* 67 COLUM. L. REV. 1529 (1967); Quinn, *supra* note 3.

[21] The growth of illegal drug traffic has given rise to a great many informers who are known to either use or sell drugs. *See* Jones v. United States, 266 F.2d 924 (D.C.C. 1959). *See also* United States v. Sherman, 356 U.S. 369 (1958); Brandon v. United States, 270 F.2d 311 (D.C.C. 1959), *cert. denied,* 362 U.S. 943 (1959); Smith v. United States, 254 F.2d 751 (D.C.C. 1958), *cert denied,* 357 U.S. 937 (1958); United States v. Lindenfeld, 142 F.2d 829 (2d Cir. 1944), *cert. denied,* 323 U.S. 761 (1944).

The informant's illegal activity is not confined solely to drug traffic. Informant's have been known to engage in every illegal activity from prostitution to pickpocketing. *See generally* Donnelly, *supra* note 3, at 1094.

[22] *See* United States v. Irby, 304 F.2d 280 (4th Cir. 1962), *cert. denied,* 371 U.S. 830 (1962).

> . . . [The informer] was shown to be a man of unstable character and credibility. It is from persons of this type rather than from the law-abiding that information as to the violation of the law is likely to be obtained . . . . *Id.* at 283.

[23] There have been instances where informant's have been known to receive money, sentence reductions and even drugs as rewards for information supplied by them. Under these conditions it is to be expected that the temptation to concoct fallacious accusations will be great. *See* Jones v. United States, 266 F.2d 924 (D.C.C. 1959); Note, *Testing the Factual Basis for a Search Warrant,* 67 COLUM. L. REV. 1529 (1967).

There are various judicial statutes which provide for compensation to informers who supply information concerning criminal activity. The activities vary from narcotic drug to custom law violations. *See* Quinn, *supra* note 3, at 402 n.18.

[24] *See* note 7 *supra.*

that the informant is making a valid appraisal of the facts before coming to a conclusion. Logically, an informant's detailed account of what he purports to have actually seen would be sufficient to assure a magistrate that the informant was not merely arriving at unwarranted inferences or conclusions; though further facts would be required to show that he or his statements were credible.

Aguilar's requirement that the informant's honesty be proven is a crucial factor in safeguarding against unwarranted searches.[25] The ruling in *Manley* concerning eyewitness accounts is illogical and without support. The apparent weakness of this decision and its inherent dangers make it imperative that the court reconsider the validity of its conclusion.

D. E. E.

[25] *See, e.g.*, Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958 (1969); Note, *Testing the Factual Basis for a Search Warrant*, 67 COLUM. L. REV. 1529, 1534 (1967).