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Constitutional Law-Search and Seizure-The Standard of Reliability for the Citizen Informer is Reduced in Virginia

Constitutional Law—Search and Seizure—THE STANDARD OF RELIABILITY FOR THE CITIZEN INFORMER IS REDUCED IN VIRGINIA—*Guzewicz v. Commonwealth*, 212 Va. 730, 187 S.E.2d 144 (1972).

Searches and seizures do not violate the fourth amendment to the United States Constitution[1] where entry to specified premises is authorized by a properly issued search warrant[2] based on an affidavit showing probable cause.[3] Probable cause may be established[4] by information given to an affiant officer by an informer[5] if the information in the affidavit meets the require-

[1] U.S. CONST. amend. IV, made applicable to the states by U.S. CONST. amend. XIV, reads:

> 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 person or things to be seized.

The VA. CONST. art. I, § 10 contains provisions similar to the U.S. CONST. amend. IV:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

The VA. CODE ANN. § 19.1-85 (1960) provides in part:

> No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person . . . alleging briefly material facts, constituting the probable cause for the issuance of such warrant. . . . No such warrant shall be issued on an affidavit omitting such essentials, ...

[2] Although the fourth amendment to the United States Constitution bars unreasonable searches, the meaning of *unreasonable* has been left to judicial interpretation, and two early cases have held that a search without a lawful warrant is unreasonable. Gouled v. United States, 255 U.S. 298, 308 (1921); Boyd v. United States, 116 U.S. 616, 641 (1886). Since United States v. Rabinowitz, 339 U.S. 56, 60 (1950), the Supreme Court has interpreted the fourth amendment to consider a search as reasonable when a lawful warrant is used, and that a search may be reasonable without a warrant.

[3] The court in Chin Kay v. United States, 311 F.2d 317, 320 (9th Cir. 1962) 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.

Concerning probable cause, the court in Brinegar v. United States, 338 U.S. 160, 175 (1949) said:

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

[4] United States v. Harris, 403 U.S. 573, 579-580 (1971); Rugendorf v. United States, 376 U.S. 528, 532-33 (1964); Jones v. United States, 362 U.S. 257, 271 (1960).

[5] United States v. Harris, 403 U.S. 573, 579-80 (1971); Rugendorf v. United States, 376 U.S. 528, 533 (1964); Jones v. United States, 362 U.S. 257, 271 (1960); Manley v. Commonwealth, 211 Va. 146, 150, 176 S.E.2d 309, 313 (1970).

Concerning the use of informer information, the informer privilege, and history of

ments of the two-pronged test set forth in *Aguilar v. Texas*.[6] The first prong of that test, the informant-conclusion portion, requires that the affidavit describe some of the pertinent underlying circumstances necessary to judge the validity of the informant's conclusion.[7] The other prong, the reliability portion, provides that the affidavit must sufficiently describe the underlying circumstances from which the magistrate can determine the credibility of the informer or the reliability of his information.[8] Concerning the reliability portion of the *Aguilar* test, a small minority of jurisdictions have lowered the standard of informer credibility and have adopted the citizen informer rule, which states that a "citizen who purports to be the victim of or to have witnessed a crime is a reliable informant even though his reliability has not theretofore been proven or tested." [9]

In the recent case of *Guzewicz v. Commonwealth*,[10] the Virginia Supreme Court has adopted a seemingly liberal version of the minority citizen informer rule. In that case the defendants were convicted of possession of controlled drugs as a result of a police search of their apartment.[11] The defendants contended that the search and seizure was illegal because it violated their fourth amendment rights, in that the search warrant used to obtain entry to their apartment was based upon an affidavit that failed to establish probable cause.[12] The basis for the warrant lay in the fact that the affiant officer had been told by a citizen informer[13] that acquaintances of the latter had

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informer activity 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); Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L. J. 206 (1953).

[6] To credit an informer's information in an affidavit,

> the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were (informant-conclusion portion), and some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable" (reliability portion). Aguilar v. Texas, 378 U.S. 108, 114 (1964).

[7] *Id.*

[8] *Id.*

[9] People v. Gardner, 252 Cal. App. 2d 320, 60 Cal. Rptr. 321, 324 (1967). *See* People v. Barrett, 2 Cal. App. 3d 142, 147, 82 Cal. Rptr. 424, 427 (1970); People v. Sesser, 269 Cal. App. 2d 707, 75 Cal. Rptr. 297, 299 (1969); People v. Hoffman, 45 Ill. 2d 221, 258 N.E.2d 326, 328 (1970) (dealing with unnamed citizen informers). People v. Glaubman, — Colo. —, 485 P.2d 711, 717 (1971) and cases cited therein deal with named citizen informers.

[10] 212 Va. 730, 187 S.E.2d 144 (1972).

[11] *Id.* at 731, 187 S.E.2d at 145.

[12] *Id.* at 732, 187 S.E.2d at 146.

[13] One should note that the informer did not relate any information to the magistrate issuing the warrant but solely to the affiant.

admitted frequenting the Guzewicz apartment in order to obtain controlled drugs.[14] In addition to the above informer's allegation, the police officer's affidavit also stated that he had known the informer and her family for many years, and that the informer was reliable.[15] The Virginia Supreme Court, upholding the lower court's conviction, found that the affidavit established probable cause sufficient to justify the issuance of a search warrant.[16] In applying the informant-conclusion portion of the *Aguilar* test, the Virginia Supreme Court noted that the alleged admissions of the informer's acquaintances supplied sufficient underlying circumstances to conclude that controlled drugs were in the apartment.[17] Because the informer related only what was told her,[18] the affidavit contained double hearsay, and it is questionable whether this portion of the test should be satisfied on a basis as weak as double hearsay.[19]

The primary impact of *Guzewicz* lies in the court's holding that the reliability portion of the *Aguilar* test was satisfied by the affiant's statement that

[14] Guzewicz v. Commonwealth, 212 Va. 730, 731, 187 S.E.2d 144, 145 (1972).

[15] *Id.*

[16] *Id.* at 734, 187 S.E.2d at 148.

[17] *Id.* at 735, 187 S.E.2d at 148.

[18] *Id.* at 731, 187 S.E.2d at 145.

[19] Close examination of the affidavit shows that the informer did not relate personal experiences or observations concerning illegal drugs in the Guzewicz apartment, but merely restated what her acquaintances, the declarants, had told her. Even though the informer was considered reliable, her factual assertions of what she was told are no more reliable than the reliability of the declarants.

In judging the reliability of the declarants, the citizen informer rule should not apply because the rationale of the rule holds that the citizen informer is "more than a mere informer. He is an observer of criminal activity who by calling the police, acts openly in aid of law enforcement." People v. Gardner, 252 Cal. App. 2d 320, 60 Cal. Rptr. 321, 324 (1967). In *Guzewicz*, one might argue that the declarants' reliability could be established by their eyewitness accounts as held in Manley v. Commonwealth, 211 Va. 146, 150-51, 176 S.E.2d 309, 313 (1970), or by their statements against penal interests as in United States v. Harris, 403 U.S. 573, 583 (1971). However, the declarants did not inform a police officer as in *Harris* and *Manley*, but merely an acquaintance. Thus, the declarants may have described their activities or observations in an inaccurate manner that would discount their eyewitness accounts or statements against interest in establishing reliability.

Concerning the validity of double hearsay satisfying the *Aguilar* test, *Guzewicz* relied on questionable sources, *viz.* a dictum from United States v. Harris, 403 U.S. 573, 595 (1971), and a dictum from Spinelli v. United States, 393 U.S. 410, 425 (1969). The *Harris* dictum indicated that where the declarant is not the informer, then the reliability of the informer is more easily established; the *Spinelli* dictum indicated that an affidavit should not be held insufficient for merely containing hearsay on hearsay. Unfortunately, the *Spinelli* dictum gave no authority, and the *Harris* dictum used the *Spinelli* dictum as its authority.

See United States v. Roth, 391 F.2d 507, 511 (7th Cir. 1967); Davis v. State, — Alas. —, 499 P.2d 1025, 1029 (1972) (an affidavit must not be based on double hearsay).

the informer was reliable and that he had known the informer for many years.[20] Informant reliability has never been adequately established previously by such insignificant facts.[21] The *Guzewicz* court purports to justify its holding by stating that it "will not apply to citizen informers the same standard of reliability as is applicable when police act on tips from professional informers. . . ." [22] Upon first analysis this standard would seem to be the traditional citizen informer rule,[23] which could justifiably be used in Virginia, because the Virginia Supreme Court has held that an informant's statement of fact as an eyewitness may establish informant reliability.[24] However, closer inspection reveals a significant difference. Under the citizen informer rule the informer, in order to be deemed reliable, must relate eyewitness observations.[25] However, it should be remembered that in *Guzewicz* the informer related hearsay, and her reliability was only questionably established by insignificant facts.[26] Thus, Virginia is not following the citizen informer rule as it has been applied elsewhere. Apparently the reliability portion of the *Aguilar* test was not only relaxed in *Guzewicz* but rendered inoperative and virtually disregarded.

It is meritorious that citizens personally aid in law enforcement, and their involvement should be encouraged by facilitating their furnishing information of illegal activities to the police. Thus, when dealing with a citizen informer, it is both desirable and advisable to lower the traditional standard of informant reliability within the confines of the fourth amendment. In *Guzewicz*, although the court has made a commendable attempt to encourage participation in the prevention of crime, it appears to have gone too far. Unfortunately, the *Guzewicz* case will likely furnish authority for future searches and seizures in disregard of the guarantees of the fourth amendment. Hopefully, the Virginia Supreme Court will clarify the citizen informer rule along more traditional lines and obviate the doubtful, inconsistent findings in *Guzewicz*.

O. R. M., Jr.

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[20] Guzewicz v. Commonwealth, 212 Va. 730, 735, 187 S.E.2d 144, 148 (1972).

[21] For allegations in the affidavit that support the reliability of the informant, see United States v. Harris, 403 U.S. 573, 583 (1971) (statements of the informer that he had bought illicit whiskey); United States v. Ventresca, 380 U.S. 102, 111 (1965) (observations of fellow officers of the government engaged in a common investigation); United States v. Vigo, 413 F.2d 691, 692 (5th Cir. 1969) (statement of past reliability); United States v. Acarino, 408 F.2d 512, 514 (2d Cir. 1969) (informer had furnished information leading to convictions five times before); United States v. Kuch, 301 F. Supp. 965, 968 (D.D.C. 1968) (independent corroboration by police); Manley v. Commonwealth, 211 Va. 146, 150, 176 S.E.2d 309, 313 (1970) (statement of fact as an eyewitness).

[22] Guzewicz v. Commonwealth, 212 Va. 730, 735, 187 S.E.2d 144, 148 (1972).

[23] Cases cited note 9 *supra*.

[24] Manley v. Commonwealth, 211 Va. 146, 150, 176 S.E.2d 309, 313 (1970).

[25] Cases cited note 9 *supra*.

[26] *See* note 19 *supra*.