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New Requirement for Search Warrants

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I. Constitutional Requirements

The fourth and fifth amendments to the United States Constitution[1] provide the basic safeguards against unreasonable and illegal searches and seizures. Unreasonable searches and seizures are prevented by requiring an officer to obtain a search warrant before he legally may search any private premises. The requirements necessary to obtain a search warrant are set out in the fourth amendment:

> 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.[2]

This amendment is written in broad language and, in interpreting its provisions, the Supreme Court also has tended to speak in terms of general principles.[3] The exact minimum requirements for the issuance of search warrants have not been determined specifically.[4]

The most difficult portion of the fourth amendment to define and apply is that which refers to "probable cause." Although the definitions have varied somewhat,[5] a basic definition has begun to evolve. Probable cause exists if the facts and circumstances within the arresting officer's knowledge or 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.[6] Thus, by definition, the *facts* and *circumstances* of the individual case will determine whether "probable cause" exists for the issuance of a warrant. For probable cause to exist, the party signing the affidavit must have information or knowledge amounting to more than a suspicion.[7] The affidavit, however, need only set forth facts sufficient to allow a reasonable man to believe that a crime

[1] U.S. Const. amend. IV; U.S. Const. amend. V. Although the fifth amendment is mentioned in search and seizure cases, it is rarely relied on as a criterion for decision since the fourth amendment is particularly applicable.

[2] U.S. Const. amend. IV.

[3] See Ker v. California, 374 U.S. 23, 35 (1963); Carroll v. United States, 267 U.S. 132, 162 (1924); Wayman v. Southard, 23 U.S. (10 Wheat.) 253, 262-63 (1825).

[4] See authorities cited in note 3 *supra*.

[5] See, *e.g.*, Dumbra v. United States, 268 U.S. 435 (1925); Weller v. Russell, 321 F.2d 848 (3d Cir. 1963); Chapin v. State, 107 Tex. Crim. 477, 296 S.W. 1095 (1927).

[6] Ker v. California, 374 U.S. 23, 35 (1963); Carroll v. United States, 267 U.S. 132, 162 (1924).

[7] Adams v. State, 137 Tex. Crim. 43, 128 S.W.2d 41 (1939).

has been or is being committed; it need not establish guilt beyond a reasonable doubt, as required for conviction.[8]

The standards to be applied in a state court to determine the validity of a search warrant were unsettled until 1961. Prior to that time, evidence seized in contravention of the fourth amendment, although inadmissible in federal courts,[9] was not prohibited from admission in state courts.[10] In that year, the United States Supreme Court, in *Mapp v. Ohio*,[11] held that illegally seized evidence, acquired either with or without a warrant, was not admissible in state courts. The "exclusionary rule" set out in *Mapp* is based on the fourth amendment and is applied to the states through the fourteenth amendment.[12] The states, however, still are not precluded from adopting their own working rules with regard to search warrants, provided they do not violate the accused's constitutional rights.[13]

The holding in *Mapp* did not have the tremendous impact upon Texas procedure that it had upon the procedure of several other states. Already in effect in Texas was a statute which adopted the "exclusionary rule."[14] This statute, however, refers only to evidence excluded on the basis of federal constitution and laws; it does not apply to evidence inadmissible in federal courts under the Supreme Court's supervisory power.[15]

II. The Determination of Probable Cause

In order to determine whether constitutional standards of probable cause have been met, an impartial magistrate must pass upon the sufficiency of the search warrant and the affidavit upon which it is

[8] Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959); United States v. Heitner, 149 F.2d 105 (2d Cir. 1945).

[9] Weeks v. United States, 232 U.S. 383 (1914).

[10] Wolf v. Colorado, 338 U.S. 25 (1949).

[11] 367 U.S. 643 (1961). That holding was restated in 1963, when the Supreme Court held that the standard for obtaining a search warrant was the same under the fourth and fourteenth amendments. See Ker v. California, 374 U.S. 23, 33 (1963).

[12] U.S. Const. amend. XIV.

[13] Ker v. California, 374 U.S. 23 (1963).

[14] Tex. Code Crim. Proc. Ann. art. 727a (1953). "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

[15] Ker v. California, 374 U.S. 23 (1963). A few cases have arisen in which warrants were struck down because of failure to comply with certain requirements of The Federal Rules of Criminal Procedure even though they met the constitutional requirements of showing probable cause. See United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963); United States v. Brougher, 19 F.R.D. 79 (W.D. Pa. 1956). These cases were decided on specific provisions concerning federal procedures of executing the warrants. Since these decisions were based on supervisory powers rather than constitutional requirements, they are not binding on the state courts.

based.[16] In general, federal courts have followed the premise that "the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests."[17] Such heavy reliance on judicial interpretation may tend to discourage those searches which possibly might be made without a search warrant because, if the search warrant is based on a magistrate's interpretation and decision, the reviewing courts accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant."[18] The decision of the validity of a search warrant is left to the individual magistrate's discretion and will not be reversed unless there is an obvious abuse of that discretion.[19] This preference for judicial determination of constitutional standards for search warrants represents an effort to protect the individual's rights under the fourth, fifth, and fourteenth amendments from possible abuse by "the officer engaged in the often competitive enterprise of ferreting out crime."[20]

The facts necessary to enable a magistrate to determine whether the "probable cause" required to support the warrant exists must be set out in an affidavit signed and sworn to by the one seeking the warrant.[21] It is clear that facts must appear on the face of the affidavit sufficient to allow the magistrate to decide whether the requirements for probable cause have been met,[22] but the federal decisions have been vague concerning the specificity with which these facts must be stated.[23] Mere affirmation of suspicion or belief without further disclosure of supporting facts or circumstances has never been a sufficient statement of probable cause in federal courts.[24] Moreover, an affidavit which simply states that one is guilty of a crime is not a sufficient statement of facts for the determination of probable cause.[25]

Hearsay evidence is acceptable if it provides sufficiently definite

[16] Johnson v. United States, 333 U.S. 10 (1948); Rozner v. State, 109 Tex. Crim. 127, 3 S.W.2d 441 (1928).

[17] United States v. Lefkowitz, 285 U.S. 452, 464 (1932). See also, Jones v. United States, 362 U.S. 257 (1960); Johnson v. United States, *supra* note 16.

[18] Jones v. United States, 362 U.S. 257, 270 (1960).

[19] Evans v. United States, 242 F.2d 534 (6th Cir. 1957).

[20] Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[21] Giordenello v. United States, 357 U.S. 480 (1958).

[22] Rugendorf v. United States, 376 U.S. 528 (1964).

[23] See, *e.g.*, Ker v. California, 374 U.S. 23, 35 (1963); Carroll v. United States, 267 U.S. 132, 162 (1924); Wayman v. Southard, 23 U.S. (10 Wheat.) 253, 262-63 (1825).

[24] Giordenello v. United States, 357 U.S. 480 (1958); Nathanson v. United States, 290 U.S. 41 (1933).

[25] Giordenello v. United States, *supra* note 24; United States v. Ramirez, 279 F.2d 712 (2d Cir. 1960); Hagen v. United States, 4 F.2d 801 (9th Cir. 1925).

information.[26] An affidavit based on hearsay evidence clearly is sufficient if it contains facts which allow the magistrate to pass on the credibility of the information as well as the reliability of the informer.[27] It is necessary also that the affiant state that he believes the statements of the third party to be true.[28] If the affiant relies on his own observation and knowledge, he must state clearly those facts upon which probable cause can be based.[29]

Within the limits of the constitutional requisites as interpreted prior to 1964, Texas courts have been fairly liberal in upholding the validity of search warrants. If the affidavit submitted to the magistrate stated that (1) the affiant had reliable information from a credible person and (2) that he believed that information, such a statement was sufficient to establish probable cause.[30] Probable cause, however, could not be determined if affiant only stated that he believed and had reason to believe that certain facts existed.[31] Such an affidavit could not set before the magistrate the facts necessary to show probable cause and was held to be an attempt to substitute the judgment of the affiant for that of the magistrate.[32] The Sixth and the Second Circuits have held that if the affidavit contains both statements, it satisfies the constitutional standards.[33]

III. Aguilar v. Texas

This type of affidavit was re-examined in *Aguilar v. Texas*.[34] Two police officers applied for a warrant to search for narcotics in the appellant's home. The affidavit on which the warrant was based stated that the affiants had received reliable information from a credible person and did believe that certain narcotics were being kept by Aguilar (petitioner). In an attempt to execute the warrant, the officers forced their way into the house and seized the appellant as he tried to dispose of a packet of the narcotics. The court of

[26] Rugendorf v. United States, 376 U.S. 528 (1964); Jones v. United States, 362 U.S. 257 (1960); United States v. Meeks, 313 F.2d 464 (1963).

[27] Jones v. United States, 362 U.S. 257 (1960); United States v. Ramirez, 279 F.2d 712 (2d Cir. 1960).

[28] United States v. Eisner, 297 F.2d 595 (6th Cir. 1962).

[29] United States v. Ramirez, 279 F.2d 712 (2d Cir. 1960); Evans v. United States, 242 F.2d 534 (6th Cir. 1957); Garhart v. United States, 157 F.2d 777 (10th Cir. 1946).

[30] Davis v. State, 165 Tex. Crim. 2, 302 S.W.2d 419 (1957); Clinnard v. State, 149 Tex. Crim. 472, 196 S.W.2d 522 (1946); Weaver v. State, 139 Tex. Crim. 134, 138 S.W.2d 1081 (1940); Rozner v. State, 109 Tex. Crim. 127, 3 S.W.2d 441 (1928).

[31] Ruhmann v. State, 113 Tex. Crim. 527, 22 S.W.2d 1069 (1929).

[32] *Ibid.*

[33] United States v. Meeks, 313 F.2d 464 (6th Cir. 1963); United States v. Eisner, 297 F.2d 595 (6th Cir. 1962), *cert. denied*, 369 U.S. 859 (1962); United States v. Ramirez, 279 F.2d 712 (2d Cir. 1960).

[34] 378 U.S. 108 (1964).

criminal appeals upheld the issuance of the search warrant, holding that the affidavit showed probable cause.[35] Similar affidavits frequently had been upheld in the Texas courts.[36] The United States Supreme Court reversed and held that the affidavit did not set forth sufficient facts to show probable cause.[37]

In holding the affidavit unconstitutional, the Supreme Court relied especially on the cases of *Nathanson v. United States*[38] and *Giordenello v. United States*.[39] In the *Nathanson* case, the affiant stated that he had "cause to suspect and did believe that certain merchandise"[40] was on the described premises. The Court held that the affidavit "went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts,"[41] and that specific facts or circumstances must be presented to the magistrate so that he can determine whether probable cause exists. In the *Aguilar* case, the Court said the vice in the affidavit was at least as great as that in the *Nathanson* case, because only conclusions as to probable cause made by the officers were stated in the affidavit without the benefit of impartial judicial interpretation of the facts that had prompted these conclusions.[42] Mr. Justice Clark, however, speaking for the dissent in *Aguilar*,[43] distinguished the two cases. He said that nothing in *Nathanson* suggested that any facts had been brought out to support a belief or suspicion, while in *Aguilar* the affidavit was based not only on "affirmance of belief" but also on "reliable information from a credible person."[44] The dissent, therefore, placed great importance on the additional information that a credible informer had given the officers reliable information. Whether such additional information would have made any difference in the *Nathanson* decision is highly questionable.

In the *Giordenello* case, the affiant swore that the appellant "did receive, conceal, etc. narcotic drugs . . . with knowledge of unlawful importation."[45] The Court said that the affidavit was insufficient because no basis was given for any sort of judicial determination of probable cause. It neither gave facts nor sources to support the

[35] Aguilar v. State, 172 Tex. Crim. 629, 362 S.W.2d 111 (1962).

[36] Griffey v. State, 168 Tex. Crim. 338, 327 S.W.2d 585 (1959); Davis v. State, 165 Tex. Crim. 2, 302 S.W.2d 419 (1957); Ruhmann v. State, 113 Tex. Crim. 527, 22 S.W.2d 1069 (1929).

[37] Aguilar v. Texas, 378 U.S. 108 (1964).

[38] 290 U.S. 41 (1933).

[39] 357 U.S. 480 (1958).

[40] Nathanson v. United States, 290 U.S. at 44 (1933).

[41] *Id.* at 46.

[42] 378 U.S. at 113.

[43] *Id.* at 116. Mr. Justice Black and Mr. Justice Stewart joined in the dissent.

[44] *Id.* at 118.

[45] Giordenello v. United States, 357 U.S. 480, 481 (1958).

stated conclusion of appellant's guilt.[46] In the instant case, the Court said that there was no appreciable difference between *Aguilar* and *Giordenello*. The magistrate must be informed of the underlying circumstances from which the affiant concluded that the informer was credible or reliable.[47] Again, the dissenting justices in *Aguilar* distinguished the case from *Giordenello*. Their first contention was that *Giordenello* had been decided under the supervisory powers of the court given by rules 3, 4, and 41c of the Federal Rules of Criminal Procedure. The majority, however, correctly stated that the Court in *Giordenello* had construed the requirement of "probable cause" contained in rule 4 of the federal rules in the light of the fourth amendment requirement of probable cause which that rule implements. The requirements announced in *Giordenello* ultimately derived, therefore, not from the Court's supervisory powers but from the fourth amendment.[48] The dissenting Justices also said that even if the decision could not be distinguished on the theory that it was based upon the Court's supervisory powers, the *Giordenello* case could be distinguished from the *Aguilar* decision because *Giordenello* did not indicate a source for the affiant's belief or "any other sufficient basis upon which a finding of probable cause could be made,"[49] while *Aguilar* stated that the information had come from a reliable source.[50] Although there is a distinction between the two cases, very narrow analysis would be required to make this distinction controlling. The theory behind the *Aguilar* decision is that there must be a judicial determination of probable cause; the mere addition of an assertion that the information has come from a reliable source would not increase appreciably the magistrate's ability to make such a determination. Thus, it is doubtful whether *Giordenello* would have been upheld simply because of an additional statement that the information had come from a reliable person.

Regardless of the interpretation of the rationale of the holding, *Aguilar* establishes a constitutional requirement that the magistrate must be informed of some of the underlying facts or circumstances from which the affiant concluded that a crime had been or was being committed, and some of the underlying facts or circumstances from which the affiant concluded that the informer, whose identity need not be disclosed,[51] was credible. Only full compliance with these

[46] *Id.* at 486.
[47] 378 U.S. at 114.
[48] *Id.* at 112.
[49] *Id.* at 119.
[50] *Ibid.*
[51] Rugendorf v. United States, 376 U.S. 528 (1964).

requirements can show the requisite probable cause for the issuance of a search warrant by state officials under the fourteenth amendment or by federal officials under the fourth and fifth amendments.

IV. Conclusion

In the short time since *Aguilar* was decided, it has drawn much criticism, some of which is valid. One of the most forceful points of criticism concerns the case in which an informer is relied upon to establish "probable cause." Now, the officer is required to state specifically some of the facts which the informer told him and some of the circumstances from which he concluded the informer was credible or reliable. In many cases, this disclosure will as sufficiently identify the informer as if his name were given, and thus place him in danger. The result may be that those people who may have the most pertinent and reliable information will keep silent. Thus, a very valuable source of information may well be closed to police officers in many cases.

Another forceful argument against the *Aguilar* approach is that apparently a police officer who has no personal knowledge of the crime can no longer rely on the unknown informer to furnish sufficient information to establish "probable cause." If the officer receives information from such an unknown source, he first must gain personal knowledge corroborating the informer's information before seeking a search warrant. It also may be possible for the officer to satisfy the requirements of *Aguilar* by checking the reliability of the informer rather than the credibility of what the informer told him. This latter possibility could be less time consuming, and therefore an attractive alternative if time were important in securing the search warrant.

In those cases in which an officer relies on personal knowledge, the argument is that a magistrate must decide on "probable cause" without benefit of the officer's experience and knowledge. Previously, the officer often has relied on his previous experience and intuition without stating supporting facts in the affidavit. Now, however, the affiant cannot rely on a search warrant with the phrase "reliable information of a credible person" as a substitute for a statement of the facts on which his suspicion actually is based. "Probable cause" should exist at the time of the issuance of the search warrant and not after a search has been made. If the officer is unable to state sufficient facts of his own knowledge which would show "probable cause," it would seem that the search warrant is now correctly refused. If the officer knows sufficient facts of his personal knowledge,