IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT, IN AND
FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NUMBER: 01-2017-CF-001221-A

NATWAINA CLARK,
Defendant.
_____/

DEFENDANT'S MOTION TO SUPPRESS

The Defendant, NATWAINA CLARK, by and through undersigned counsel, pursuant to the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Constitution of the State of Florida, moves this Court for an order suppressing any and all evidence obtained by the March 28th, 2017 search of the Defendant's residence, the March 29th, 2017 search of the Defendant's residence, the March 28th 2017 search of the Defendant's Wells Fargo bank account, and both of the March 30th 2017 searches of the Defendant's vehicle. As grounds for this Motion, the Defendant states that:

1. Ms. Clark was employed by the city of Gainesville Department of Parks and Cultural Affairs in an administrative capacity.

2. Ms. Clark is alleged to have made a large number of purchases on city issued purchasing cards which were for her own use and not the use of the city.

3. In the course of the investigation of Ms. Clark, Officer Nicoloff sought and was granted a number of search warrants.

4. A large number of objects and documents were seized pursuant to said warrants. Items were seized or attempted to be seized at Ms. Clark's residence, within her automobile, and her bank account.

5. The initial warrant pertained to her home, which was issued on March 28th, 2017 signed by Judge Miller-Jones. The remaining warrants reference the previously granted search warrant applications.

6. The Defense moves to suppress all evidence seized as a result of these warrants, due to deficiencies, misstatements, and omissions which occur throughout the sworn warrant applications. The Defense would request a Franks hearing. (Franks v Delaware 98 S.Ct 2674 – where upon a showing by sworn affidavit that an intentional or reckless misstatement was used to determine probable cause, a hearing may be required)

7. Ultimately, these warrants all:

    a. fail to accurately describe the probable cause, if any, by misstating the facts as known to law enforcement at the time of the issuing warrant thereby undermining any probable cause determination, including omitting information bearing on the credibility of a necessary witness;

    b. the omission of crucial information regarding possible commission dates, rendering any warrant stale, and;

    c. the failure to accurately describe a nexus between any probable cause and the places to be searched.

8. Additionally, to establish probable cause, a supporting affidavit for issuance of a search warrant must satisfy two elements: first, that a particular person has committed a crime—the commission element, and second, that evidence relevant to the probable criminality is likely located at the place to be searched – the nexus element. Sanchez v. State, 141 So.3d 1281, 1284 (Fla 2d DCA 2014).

9. The Defense further alleges that these warrants lack a nexus between the place to be searched and the allegations set for in the applications.

10. The Defense will address each warrant in turn.

11. MARCH 28th 2017 RESIDENCE WARRANT APPLICATION

    a. Experience Omission: This warrant application totally omits any description of the experience the detective has in investigating financial crimes, and/or where evidence of said crimes tend to be located.

    b. Not Particularized: The list of items to be seized has 38 parts. None of the items listed are described factually as being purchased by Ms. Clark or even being connected to the fraud allegations within the probable cause section of the application. The probable cause section describes fraud in an aggregate, but does not particularize any item or purchase and connect the item to Ms. Clark.

c. Insufficient Nexus: No item is stated as being known or suspected of being within the residence of Ms. Clark.
Furthermore, there is no mention of evidence of nexus, since there is no indication the place to be searched is the home of Ms. Clark, or that Ms. Clark was at the location at any time.

The primary investigating Officer has omitted from the search warrant application the fact that no witness indicated any purchased item would be in the home or vehicle of Ms. Clark. (*See deposition of Officer Nicoloff*, 28:24-25, 29:1-2)

d. Material Omissions: Even assuming probable cause is established, the Officer has intentionally or recklessly omitted the true time period when the items to be seized were allegedly acquired by Natwaina Clark, the nature of the fraud, and the description of the witness statements identifying the fraud.

a. To wit – the items alleged have no time periods of purchase. However, Detective Nicoloff was aware of the true time periods of the allegedly fraudulent purchases per his report, and all times of purchase range from November 2015 – November 2016 per his report.

b. Detective Nicoloff stated in his application that the credit card purchases at issue were "unapproved," and determined to be fraudulent after review by the cardholders. This statement recklessly omits the truth of the nature of the fraud from the Court.
Per his report and deposition, Detective Nicoloff determined that city employees Russell Etling and Linda Demetropolous would pre-sign entire stamp books worth of 'pre-certification stamps,' and made them available to Ms. Clark to use. These certifications are written statements attesting that the expenses were incurred as a necessary expense of the city of Gainesville and done in conformity with their regulations. The witnesses also admitted that they would intermittently skim the monthly expense packets.

c. Officer Nicoloff has omitted from the search warrant relevant information bearing upon the credibility of a primary witness, John Weber. John Weber indicated to the Officer that he did not give Ms. Clark her purchase card information. However, when asked why if his information was stolen, are some of the charges on his card legitimate, Mr. Weber indicated that the purchases were legitimate but he didn't give her permission to make them. This calls into question Mr. Weber's credibility regarding his honesty with law enforcement.

d. Officer Nicoloff indicated that there is video of her making some of the fraudulent purchases, clearly implying a multiplicity of video incidents captured. However, per his report, Detective Nicoloff only reviewed a single purchase which he believes captures Ms. Clark making a purchase at CVS in 2017. The remaining video surveillance from various stores were not able to be viewed by the Officer at the time he wrote the applications.

12. MARCH 29th 2017 RESIDENCE WARRANT APPLICATION

a. The Defense adopts all the same arguments and reasoning of the previous warrant application challenge, and would further allege:

b. There is no factual description of why the deposit books (Wells Fargo) are connected to this allegation, and no indication in the probable cause that Ms. Clark used Wells Fargo or that said books were instrumentalities of crime nor how they are connected to these allegations at all.

c. There is no indication that a medical procedure is involved in this probable cause.

13. MARCH 28th 2017 WELLS FARGO WARRANT APPLICATION

a. The Defense adopts all the same arguments and reasoning of the previous warrant application challenge (however the defense would concede that the Officer added a section describing knowledge of activities of people conducting illegal activities in general), and would further allege:

b. The description of general practices of those committing crimes is overbroad and non-descript, and doesn't describe the basis of this knowledge or experience.

c. The Officer indicates the Paypal account essentially matches in name alone. There is no allegation of corroborating information to support the account has a nexus to Ms. Clark.

d. The Officer indicates money can be transferred between bank

accounts, however there is no nexus establishing that that was done in this case, or that a Wells Fargo account was used by Ms. Clark or any funds were transferred to Wells Fargo.

14. MARCH 30th 2017 AUTOMOBILE WARRANT APPLICATION

a. The Defense adopts all the same arguments and reasoning of the previous warrant application challenge, and would further allege:

b. Probable cause: The vehicle to be searched was seized during a traffic stop, solely at the direction of law enforcement to apprehend Ms. Clark for her questioning and arrest. There is no indication that there is any probable cause to seize the vehicle during the arrest of Ms. Clark, or that the vehicle is the instrumentality of any crime.

c. The warrant indicates 'merchandise' is visible. However, this observation is made after the illegal seizure and towing of Ms. Clarks vehicle, and in no way describes the contents of said 'merchandise.' The Officer states, without any articulable facts, that he believes fraudulent purchased items are within the vehicle without any probable cause description or nexus to Ms. Clark. This lack of information fails to provide the Court with a particular item to be seized, the specific facts supporting probable cause of those items, or connects said items to Ms. Clark.

d. Of the 23 items listed as objects to be seized, there is no articulation of how any are connected to the probable cause, and fail to describe a nexus to Ms. Clark.

15. MARCH 30th 2017 AUTOMOBILE WARRANT APPLICATION

a. The Defense adopts all the same arguments and reasoning of the previous warrant application challenge.

WHEREFORE, Defendant respectfully requests that this Honorable Court enter an Order suppressing the evidence illegally obtained.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Omar Hechavarria, Assistant State Attorney, by eservice at eservice@sao8.org, 120 West University Avenue, Gainesville, Florida, this 12th day of July, 2019.

/s/ Matt Landsman

Matt Landsman,
Florida Bar #0010525
Assistant Public Defender
OFFICE OF THE PUBLIC DEFENDER
STACY A. SCOTT
151 SW 2nd Ave
Gainesville, Florida 32602
352.338.7382
landsmanm@pdo8.org

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. 01-2017-CF-1221-A

NATWAINA SHAREE CLARK,

Defendant.
_____/

CONTINUED
DEPOSITION OF: Visvambhara Nicoloff

DATE: April 29, 2019

TIME: 4:10 p.m.

PLACE: 209 SW 2nd Street
Gainesville, Florida 32601

APPEARANCES:

On Behalf of State:

Omar Hechavarria
Assistant State Attorney
120 West University Avenue
Gainesville, Florida 32601

On Behalf of Defendant:

Matt Landsman
Assistant Public Defender
151 SW 2nd Avenue
Gainesville, Florida 32601

I-N-D-E-X

E-X-H-I-B-I-T-S

(No exhibits offered.)

NOTARY PUBLIC: April 29, 2019, at 4:10. This is a continuation of a deposition in State vs. Natwaina Clark, 01-2017-CF-1221-A. Will the attorneys please state their appearances for the record?

MR. LANDSMAN: Matt Landsman on behalf of Ms. Clark.

MR. HECHAVARRIA: Omar Hechavarria, assistant state attorney.

NOTARY PUBLIC: And I'll swear you in again. Do you swear or affirm the testimony you are about to give will be the whole truth?

THE WITNESS: I do.

NOTARY PUBLIC: Please state your full name and occupation?

THE WITNESS: Visvambhara Nicoloff. I'm a corporal with the Gainesville Police Department.

DIRECT EXAMINATION

BY MR. LANDSMAN:

Q. Corporal, let me ask you some more questions about the case of Natwaina Clark where you were deposed previously, but we continued it based on some other evidence that was disclosed. You have a copy of your report in front of you; is that correct?

A. Yes, sir.

Q. Okay. I believe it's approximately 21 pages. You

indicated -- I think we talked before about different documents that may exist in the case and that would include like search warrant applications and returns, subpoena requests which I think you also made. Did you ever send those forward, the subpoena requests to the state attorney's office?

A. Yes. Yeah.

Q. Okay. So subpoena requests were done. Any other written documents that you can remember that you have that you could submit to the state attorney's office?

A. I believe it was just the subpoenas and the search warrants. I was actually given some timesheets.

Q. Timesheets. Okay.

A. Of Natwaina Clark. I believe that was included with the evidence.

Q. Okay.

MR. HECHAVARRIA: Is that what you burned on the disk?

THE WITNESS: No. That was not included. I (indiscernible).

BY MR. LANDSMAN:

Q. I think I already asked about Facebook, but there was some Facebook stuff that was preserved with the -- like either in evidence or some sort of storage unit. Does that sound accurate, but you don't remember the contents of it?

A. Yeah, I don't recall.

Q. The Facebook data? Okay.

A. Yeah.

Q. Okay. I think I was asking about the statement of Mr. Weber on 3/27. Okay. The Excel spreadsheet that you sent to -- do you still have that?

A. Which one, sir?

Q. Oh, I'm sorry. Mine is listed as page 19. Okay. Go to that section for Hefner.

A. What date because they're labeled.

Q. The last entry, the one after it that says 3/27. So go to 3/23.

A. Okay.

Q. Okay. Well, first of all, I'm looking between 3/23 and 3/27.

A. Okay.

Q. So it's on 3/23, you're making an Excel spreadsheet to figure out when charges are made but they're actually on days when -- that are either weekends, holidays or paid time off of Ms. Clark. Does that sound accurate?

A. So let me just review this. Yes.

Q. All right. And that Excel spreadsheet, was that sent over --

A. I believe so. I believe it was included with the evidence.

Q. Okay. And so you did that analysis yourself, though, from punching in the information from the PDF file from the work -- so there's a work attendance record.

A. Yes.

Q. You took that work attendance record and you made the Excel spreadsheet yourself?

A. I compared it against the purchases.

Q. And you're literally typing in all of the data points?

A. Yes. Yes.

Q. Okay. And then how come you pointed out four things in that section. You put 5/13, 72, 73 and 529 all of 2016. Why did you point out those, in particular, even though you're saying there's 47 fraudulent purchases?

A. Those four are specific dates she was not working. I don't know if they were the exception. I would have to review the actual --

Q. Well, you're putting the fraudulent purchases. What makes you say the other --

A. Well, the fraudulent purchases, that statement is based on the statements made by Hefner and the others claiming that the purchases made on their card were fraudulent.

Q. Okay.

A. So the comparison made against her schedule was

only against the purchases that were indicated to be fraudulent.

Q. You mean not authorized by someone else?

A. Correct. Correct.

Q. Okay. But you put these four here and you say I continued to look in count 47 of the fraudulent purchases that were made while Clark was not at work. Oh, so you're referencing the stuff from a larger spreadsheet, or is it the same spreadsheet?

See, because then your next sentence, I completed an Excel sheet. Are you talking about the same one or are you talking about -- I don't know if you know --

A. Sure.

Q. -- there's like a master. There is kind of like a huge master spreadsheet that was produced by the city in the course of this case?

A. Yeah. As far as the purchases.

Q. It's like 180 things.

A. But are you talking about as far as the purchases on the credit card?

Q. Yes.

A. Yes.

Q. And it looks like --

A. Yeah. And it had the highlights with the F next to this.

Q. I think so. It's huge.

A. Yes.

Q. And it's like printed on a huge piece of paper. I think it was submitted by the state to the court in like a statement of particulars. Does that sound familiar to you?

A. Yes.

MR. HECHAVARRIA: It is a different one. The one that was submitted were updated per your request to add additional information.

BY MR. LANDSMAN:

Q. So the master document that was updated, the one you were looking at would have been the same minus the details of how the witnesses offer it. Is that accurate?

A. It would be the initial one that I was produced. It was not the updated one from what you -- yes.

Q. Right. But the updated one appears to be an expanded version of the same --

A. I haven't seen the updated one.

Q. Oh, okay. But it is.

MR. LANDSMAN: Do you know that?

MR. HECHAVARRIA: If there was an original Excel spreadsheet that the witness came in in one of the first depositions you asked additional information to be included. I asked for additional information to be included and so that information was added to and there was some information

deleted from.

He may have been looking at a different one or an earlier version without the additional information or information that was taken out.

THE WITNESS: The one that I was looking at would have been whatever was current on the 23rd of March.

BY MR. LANDSMAN:

Q. Right. The one from the 23rd of March, would it be fair to say -- okay, so that document -- I mean if it's changing. But in terms of being expanded, more information is going to be added to it, maybe a couple of things are deleted. That document was -- that Excel spreadsheet that should be in evidence from that time period reflects what witnesses have sworn to you as to their -- what they believed at the time during the investigation with the city. Does that sound accurate?

A. To be like fraudulent or not fraudulent?

Q. Or authorized or not authorized, but the city is giving that to you as an indicator of their investigation?

A. Correct. The production as far as this -- the comparison that I made was based on what they provided me at the initial investigation.

Q. All right. And who provided that to you and what did they say about how they produced it? Was that Weber?

A. I would have to go back to the beginning, I think,

because that's where I received the packets.

Q. Okay. I see. All right. Well, we can always go back to that and see if the city provided a spreadsheet. Every time you took a statement from one of the city employees, were those statements sworn statements or were there only specific ones that were sworn?

A. They were not sworn statements.

Q. Okay. Okay. So after the 23rd, the next session is 3/27 where you called Mr. Weber and it says about him, why weren't all the charges fraudulent on his card.

A. Correct.

Q. Okay. You wanted that clarified. What did you learn that made you want to clarify that because that's about four days later?

A. Well, his statements to me, to my recollection were that she was never supposed to use his card. His card was -- he knew that the policy was that nobody else was supposed to use his card but him, and then when he provided me with the statement sheet which had some of them fraudulent and some of them not, that obviously raised the question, well, if none of them were supposed to -- she was never supposed to utilize their card at all then shouldn't they all be fraudulent.

Q. I see.

A. That was my concern.

Q. Okay. But there's a time period where it says 3/23/17, you're doing the subpoena request for Delta Air, Cox Communications, Walmart sworn complaint, Sun Biz and contacting Hefner, but then you're not talking to Mr. Weber until four days later. Did you learn anything in that time period that made you believe you should go back and question Mr. Weber again?

A. I don't recall specifically when it got on my to do list to call Mr. Weber, but just due to the amount of stuff that I had to do and the amount of stuff that I had to process I mean like I said I can't tell you why there was a delay in the time period, but I know at some point it ended up on my to do list and it just kind of got done when it got done.

Q. Okay. In that paragraph when you called Clark where he says he did not intentionally give Clark his credit card information but that after reviewing the charges that were made on his card he determined that some of the charges she put on his card were for legitimate purchases.

Although he did not use his card for those purchases, did he clarify which of them were legitimate and which ones were not legitimate?

A. I believe that was all indicated on the statement report that was given to me initially.

Q. What do you mean?

A. Like they were highlighted with the F next to them, even on his credit card statements.

Q. Did he say who put those -- did he go through that with you to determine -- because you're talking on the phone?

A. Yes, for this time, but when I was given the packet, the statement of the credit card usages, the ones that they claimed were unauthorized were highlighted with the F next to them, and that included his credit card statements. So that's what I was basing my comparison on was that format that was given to me.

Q. So you're asking how come on that form how come --

A. Not all of them were unauthorized.

Q. Were not all unauthorized?

A. Yes.

Q. Okay. And so he's telling you that those are the ones that he looked through and he thought he did not authorize?

A. Yes. Yeah, he said that some of the purchases were for legitimate items, for legitimate purchases within their office.

Q. But at this point, was it already known to you that he was doing the preapproval stickers?

A. To my recollection -- I may have to review this, but I don't believe he was doing that. I believe that the

stickers were only being done by the other two. I'd have to check. Let me see.

Q. Let me see. Did you have any communication with Carlos Holt? I believe he was the city auditor about their investigation?

A. I did speak with one of their auditors. I don't remember who it was.

Q. Okay. So that's happening at the same time or is that all -- it's not completed, the audit of the finances?

A. No. This was fairly quickly after they had discovered that -- because she was still on I want to say like -- they had never even suspended her at that point, I don't believe. So it was fairly rapidly after -- yeah.

Q. It was real close.

A. After they had discovered this was happening, I was brought into the situation. So I highly doubt that their audit was complete at that point.

Q. So how is this. Can you take a look at your report in the second -- okay, yours should be the second page, second paragraph?

A. Uh-huh.

Q. Where it indicates for expediency and ease both Etling and Demetropoulos would pre-sign entire stamp books worth of certification stamps and made them available to Clark to use?

A. Is that the beginning of the paragraph?
Q. This paragraph here.
A. Due to mistakes. It's that one?
Q. Yeah.
A. Okay. Yeah, and I believe that it was those two that were doing the signs and not Weber; right?
Q. But I'm asking about -- did I ask for Weber or Etling?
A. I thought it was Weber.
Q. Oh, I'm sorry. Then I'm asking --
A. Because Weber is the one that --
Q. I'm sorry.
A. That's okay.
Q. I conflated Weber with Etling. Okay. Weber is going back and telling you this, clarifying this?
A. Yes. Yes.
Q. Etling told you from the beginning?
A. Yes. He said that, yes, she made purchases for me.
Q. And he also -- did he also admit to you that he was pre-authorizing purchases through stickers?
A. Let me verify that. I believe he told me that but I want to verify that it was him that told me that.
Q. Okay.
A. Okay. So, yeah, that information was passed to me

while I was at the meeting with the large group of people in the beginning.

Q. Beginning.

A. So whether it came out of his mouth directly or not, I don't recall, but he was definitely there when those --

Q. The city is making you aware of this?

A. Yes. Yes.

Q. Are they also making you aware of not only the preauthorization stickers at that time, they're also telling you about a monthly review as well?

A. Yes. Yes. As far as them finance, reviewing with the stickers on it, reviewing the purchases and that kind of stuff, yes.

Q. Yes. Okay. You talked to Weber and then you try to make contact with Clark. Was it your intent to arrest her at that time? The date of 3/23/17?

A. Yeah, I responded out. At that point I was hoping to get her in for an interview. That was my intention.

Q. Did you think you had probable cause to arrest her at that point?

A. At that point I believe I did.

Q. Okay. So you're going to do an interview and then if she spoke or not you were going to intend to arrest her at that time?

A. Yes.
Q. Okay. Is this an apartment complex?
A. Yes, it is.
Q. Was the car parked in like a private driveway or it says a driveway?
A. No.
Q. Could you describe --
A. It would just be just for the people that live there. I don't believe that it was marked but, no, it wouldn't be a driveway like up to a house or anything like that.
Q. Do you remember the name of her residence, the complex?
A. I do not.
Q. 820 Northwest 19th?
A. Yeah. You can pull up in your like.
Q. I'm just wondering if it's -- was it a gated community or not?
A. I do recall some sort of wall maybe, but it's not gated in like there is security or --
Q. Okay? Code?
A. -- no, nothing like that.
Q. What position did you have to get into take a photograph of the car?
A. Beside the vehicle?

Q. Yeah.
A. You mean, yeah.
Q. Like you had --
A. I was standing in the parking lot.
Q. Like the parking lot, like a sidewalk parking lot?
A. Yeah. Like I said, it's a sidewalk in a parking lot that goes in front of multiple residences or multiple apartments.
Q. And when you say Clark's computer, it's her computer from work; is that correct?
A. Correct. Yes, sir.
Q. Did you ever find out who the support supervisor was with the city's IT department? Who had access to her drive?
A. Not to my knowledge.
Q. Okay.
A. I don't see it anywhere and so I don't independently remember.
Q. Okay. Okay. And then David Bear (phonetic) did a forensic image?
A. Correct.
Q. Okay. So he had the entire drive copied? That's his goal?
A. As far as I understand, yeah. The forensic is to take it out without manipulating it.

Q. Okay. On 3/28, you go on with the next day investigation, you don't see the vehicle. You never saw Ms. Clark at that residence?

A. No, I don't believe so.

Q. Did you ever receive any evidence from PayPal proving that Natwaina Clark was the recipient of the money?

A. I did receive a response from the PayPal subpoena. Yes. Are you talking about specifically the NC83FMU, whatever?

Q. Yeah. Is there any way to prove that that, from the records you got from PayPal, was some way to prove that that was Natwaina Clark?

A. Yes.

Q. How?

A. Yes. It as her name on it. Let me see what else it has on it.

Q. Do you have a copy of it?

A. Yes.

Q. Can I see? Okay. It looks like the print off that was to you. It looks like a (indiscernible) investigations.

A. Yeah.

Q. And so it says some sort of summary from --

A. Yeah, credit card statement name.

Q. It's a name and email?

A. Yeah. There is more to it than just that. Phone number, residence. There was some other stuff. There is several documents.

Q. Well, is there any way, from looking at the PayPal records, any way to prove that that -- I mean other than saying it says same, either name, address or phone number, is there any way to prove that that was actually her like to create a PayPal account from your knowledge of PayPal or the records?

A. I guess I don't understand the question.

Q. Like to open a bank account at a bank, I assume one would have to present like an identification or something like that.

A. Sure.

Q. Do you know anything about the system of PayPal? Is it the same or different?

A. I do not. I do not.

Q. Other than the document you have there, is there any other knowledge that you have to identify that she's actually the recipient of the monetary transactions?

A. To my recollection, I mean like I said, there is multiple documents there, but based on that, yeah, that's what I was basing my belief on.

Q. Okay. None of the documents have photographic evidence or signatures; is that correct?

A. Not to my recollection, but I would have to review it again to give you an exact answer.

Q. Okay. All right. All right. Any of the photographs from Sun Pass, were you able to see a photograph of Natwaina in the vehicle going through the Sun Pass booths?

A. I don't recall. Just one second. Let me look.

Q. Well, first of all, I'm looking at the date 3/20/17, after the PayPal (indiscernible) thing then the next paragraph says Sun Pass responded very soon afterwards?

A. Uh-huh.

Q. That paragraph and it talks about photographs you said would show --

A. It shows Clark's vehicle going through the Sun booths.

Q. Yes.

A. I don't recall as far as whether she was actually visible in there or not. Let me just read this. At least in that section right there I don't indicate that she was. I believe it was just her vehicle that was shown going through.

Q. Okay. And who is Tracy Whiteley? Was that an employee of the city, providing Ms. Clark's direct deposit information?

A. I would imagine it is. I mean that's a city

extension. I don't independently recall who she is for the city. Let's see if I mentioned it before.

Q. Likely. Let's say she's a city employee, or a bank employee. From the information she provided to you in the documents you received from Wells Fargo, were you able to confirm Ms. Clark receiving any of the funds from the city into that Wells Fargo account?

A. I would have to review it again. Yes. So I didn't review it after I had completed my search warrant. I reviewed her account with the bank and she was receiving payments from her PayPal account.

Q. Was that summarized in one of your paragraphs?

A. It should be.

Q. I see.

A. It's after the search warrant. So it was after the search warrant.

Q. 3/29?

A. Yeah. There should be three bullets with bids, emergency and safe house. Right there.

Q. This one?

A. No, no. Go up.

Q. Gotcha.

A. So then it's after that.

Q. Okay. You list here page 23. Okay. So it's a couple of pages back. Okay. Then you get advised by

McCazzio that Clark is in her vehicle and she's pulling out. Was that a conscious decision to do the arrest on her while she was driving?

A. At that point I believe that she wouldn't come to the door, even if she was home, and at that point I had to make a decision whether or not to try to contact her at home and, you know, get her to come back to the station potentially or to simply make the arrest and I decided to have him make the arrest.

Q. One thing, was there a conscious decision to have probable cause and then wait until she gets into a vehicle?

A. No. No, no. Detective McCazzio --

Q. The car could be counted as well?

A. -- yeah. Detective McCazzio was -- he knew I was looking for her. He had come with me initially looking for her and then he got up behind her and from my understanding it was simply her pulling out onto Sixth Street.

Q. Okay. So she gave you the key to her residence. Was the home ever entered before the warrant was secured?

A. I believe it was for -- no, no, before the warrant was secured, no, sir.

Q. Okay. So even though she gave you -- asked to get the dog in her house and give it to her sister, she wasn't giving you permission to search the house or enter her home; right?

A. No. No.

Q. So she gave you the keys for that purpose. Okay. And you don't believe the home was entered before the search warrant?

A. Let me see. No, I didn't, because we had to go and turn the dog over to her sister.

Q. So you guys did go to the house?

A. Yes. Yes. We went to the house. We met with her sister and then we turned the dog over to her sister as she --

Q. So is it correct you did enter the house?

A. Yes, yes. That was my mistake.

Q. Okay. Was there anything that you observed in the house that you included in the later search warrants?

A. No. I believe the search warrant -- yeah, the search warrant I remember had been sent off prior to me going to the house. Just the follow-up search warrant that I applied for was based on what I found once I was already conducting the search warrant, the first search warrant.

Q. So when you were talking to her you already had a search warrant in your hand?

A. I had a search warrant that was applied for.

Q. So it just hadn't been signed yet?

A. It had not been signed yet.

Q. Okay. Look down on the paragraph, it says does it

give you a chance to obtain a search warrant?

A. Where?

Q. Two paragraphs down.

A. From where?

Q. Once Clark was brought to GPD the place was secure in CID. You agree to pick up Taylor. The next paragraph, advises she has a dog at residence, gather keys and the paragraph following that and in the paragraph it says hold off on her phone privileges to give me a chance to obtain a search warrant.

A. Yes.

Q. Did you mean the act of signing one?

A. Yes. Because after that I completed the search warrant application and then I went to her house to turn over the dog.

Q. Okay. So Ms. Jones, this Ashley Jones, did she witness the search?

A. There should have been no search. It would have been just a dog -- turning over the dog.

Q. Okay. So then two days later --

A. It should be the next day.

Q. The next day, the 29th?

A. Yeah.

Q. So you're basically going to describe the initial entry of the home with the warrant on the 29th?

A. Correct.
Q. But it was approved the day before on the --
A. Yeah, the night before, yeah.
Q. All right. So you have a --
A. Well, actually I don't know when it was -- on the 29th I indicate that it was approved, so I don't know exactly when it was approved, whether it was that night or the following morning.
Q. On the search warrant you have it looks like 38 numbers. On the list here you have like I said, they're not 100 percent in order. You list -- they're just in different order. So each one of these items from your list was one through 16 described an item that I guess you're looking for.
A. Well, these should have been items that I seized. I believe those were items that I was looking for.
Q. Applied for, yes?
A. Yes.
Q. And in the ones you seized, you added information about when they were purchased from?
A. Yeah. I was comparing what I see as to the reason why I was looking for it.
Q. Okay. Did you get this -- you have additional information here. This item was purchased 8/30/2016, etc., the dates, you had all of that information at the time of

doing the application. Does that sound right?

A. Yes. That's what I was basing my application on, was that information.

Q. And where did you get that information from, like the Samsung flat screen TV?

A. It would be from the credit card.

Q. It's from that original list?

A. Yes. The original list.

Q. Okay. Like for example, some of these things, the Toshiba laptop, number 11.

A. Uh-huh.

Q. Other than saying a Toshiba laptop, was there any more clarity on the nature of the laptop?

A. In what sense?

Q. Well, the search warrant says 15.6 inch, but there's not a serial number or item number associated with that somewhere?

A. Not that I listed here. I would have to review the rest of the report.

Q. Okay. Were any of the items seized here added into the later search warrants or were they all separate?

A. No, the secondary search warrant I applied for was for items that I observed that hadn't been included in the first search warrant application.

Q. All the other items from the other search

warrants, were they all on the list of unapproved charges?

A. Yeah. The application I made the first time were based on some of the larger items that I believe I would be able to find or seize at her house. I left some of the smaller stuff out, just so it would not get lost in the weeds, but once I was in there and I started seeing things that I remembered from the credit card charges, I did the secondary application.

Q. Okay. So the amendment warrant you were mentioning, working out with ASA Becker, that's actually the second residential warrant; right? It's a separate warrant produced after it?

A. Yes. Yes. Separate from this one.

Q. But it's actually in another warrant; is that accurate?

A. I've heard it be called amended, so if I'm -- that's not accurate.

Q. That's okay. But another judge is signing them?

A. Yes, yes. It had to be re-signed.

Q. Okay. Oh, when you went to get the first warrant served with the judge, did you actually go with the -- I think it was Judge Miller Jones, somebody is covering, a county court judge possibly?

A. I don't independently recall. I would have to --

Q. Did you actually speak to that judge, or no? Or

the first initial home residence warrant?

A. I don't recall. It just says I completed the search warrant application.

Q. Do you remember if you did speak to a judge?

A. I have on many cases. I don't specifically remember in this one if I did.

Q. In any of these four warrants, do you remember speaking to the judge or the judge asking you anything about it?

A. Not independently. No, I don't remember.

Q. All right. Then you would review a long list of evidence that you observed from the bank records that you obtained?

A. Yes, sir.

Q. Okay. So you're trying to match up the PayPal -- the deposits from the city PayPal account and then the PayPal account into Wells Fargo?

A. Correct.

Q. Ok. And so to the best of your ability you think these roughly line up with some -- nearby in time?

A. Well, yeah. They're usually within the same day or within a couple of days of each other and then minus the fee charged by PayPal, they match up.

Q. Did you ever speak to any witnesses who told you (indiscernible) items purchased would be in her home or in

her vehicle?

A. No. I don't believe so.

Q. The Gainesville card that was found -- there is a search conducted I guess for vehicle and in that there was a wallet found with a credit card. Does that sound accurate? It says number 4224. I'm looking at page --

A. I see the list.

Q. On 3/30, one through six and then right after that it says --

A. Yes.

Q. -- Gainesville card 4224. Do you know who that was listed to?

A. I believe the 4224 was Clark's -- was the card assigned to Clark.

Q. So that would have been the card that all of her -- was that the card that all of her --

A. That was under her name. It's a city credit card that was under her name.

Q. So that was the card number for the card associated with her that the purchases were made on?

A. Let me verify that, but I believe that's accurate.

Q. Okay.

A. Yes. So that would be the card issued to Clark by the City of Gainesville.

Q. Okay. When Ms. Clark was stopped and her car was

brought in, how did she get released? Was she booked?

A. Who?

Q. Ms. Clark?

A. Yes.

Q. Did she have to go to first appearance?

A. Yeah, she went to jail that day.

Q. Okay. She went to jail. So (indiscernible) she's in the front lobby that's because she had already posted bond and come out?

A. Yes. Yes.

Q. Okay. But she did in fact go to jail that day?

A. Yes.

Q. And this is within like a weekend, something like that, 3/28 to 3/30?

A. Yeah, she was out fairly quickly.

Q. Okay. All right. So the officer provides a tip that results in some trash --

A. Correct.

Q. And the trash seems to have what you believe to be some evidence?

A. Correct.

Q. Okay. And various types of paperwork?

A. Correct.

Q. But that was from a dumpster in a --

A. That was outside of her residence, pretty much the

community dumpster.

Q. Community dumpster.

A. Or the apartment dumpster.

Q. What was the goal of trying to get something from Sprint, 4/17/17?

A. To my recollection I believe that there was a payment made to Sprint, but I need to verify that.

Q. Okay. It was nothing more complicated than that?

A. I don't believe so. I believe that there were payments made to Sprint whether it was on her card or one of the other two cards, or three cards.

Q. Okay. Just like proving it was an authorized payment, personal payment or something?

A. Yes. Yes. Okay. Yeah, because they were made to the billing account number which matched her name.

Q. When you're looking at the files from the extraction, David Bear on 4/18/17, did he actually produce an extraction report or no?

A. Can you clarify what you mean by extraction report?

Q. Isn't there a program they use to actually produce like a --

A. There's a front page, yeah, that has like clickable --

Q. Sort through stop?

A. Yes. It usually breaks it down -- usually, and I don't recall specifically but it usually breaks down by pictures and by documents and by different -- yes. So it should have been attached to the same thing.

Q. All right.

A. Because it's all clickable and user-friendly because I'm not very --

Q. Of course. Yeah, it's like a program that you have to download. Okay. But you've seen this thing and have been able to sort through it?

A. Yes.

Q. Okay. But it's actually at GPD or in evidence?

A. It should be in evidence.

Q. Or examiner Bear has it?

A. No. All of this should be evidence.

Q. Okay. So it should be in evidence. So that's the extraction on the program?

A. I know that the pictures that I located on there were placed in evidence. I believe the whole thing should be in evidence.

Q. So the extraction should be available?

A. Yes. Yeah.

Q. Okay.

MR. LANDSMAN: Omar, I assume you don't have that. No. Those things are complicated.

MR. HECHAVARRIA: None of that stuff was sent to you. I'm going to go through what you have that you put in so that I can make a specific request.

THE WITNESS: Okay. I guess once we get to the bottom, I'll verify, but this was something I definitely wouldn't have forgotten to put in evidence.

MR. LANDSMAN: No, I'm pretty sure it's there but it's a very specific manner of production because it's a special program.

THE WITNESS: I see. Okay.

BY MR. LANDSMAN:

Q. So her phone was never able to be accessed? The last paragraph of 4/25?

A. Okay. So at 4/18?

Q. Yeah. Yeah. So the stuff from the computer, something on the computer is showing you to point you to -- more in banking from -- to the PayPal account NCA3FMUand then the Rattler --

A. Where are you, sir?

Q. Well, if you look through -- I'm just going back --

A. At 4/18?

Q. Yes.

A. Okay.

Q. Looking at 4/18. You're looking through the

computer. You're noting things you think are significant two match stuff on her computer to unauthorized purchases?

A. Yes. To the invoices that were --

Q. Like you got her bank account records showing that she's receiving money from that PayPal account. And now there's evidence you find on her work computer showing some sort of Word document?

A. Well, there were receipts provided to the City of Gainesville for work orders and Rattler Laborers, I believe that was called.

Q. Yeah. Rattler.

A. Yeah. Rattler Laborers. There were invoices produced by that fictitious company to the city to show why these purchases were being made.

Q. Did you ever determine who Nicholas Kreen (phonetic) was? Whether it was a real person or not?

A. I believe to the best of my knowledge he's not a real person.

Q. The same thing, you don't believe the company is real, either?

A. Yeah. Based on my investigation, based on what I've looked at, Sun Biz and Google and everything else I could, I didn't find corresponding --

Q. So Nicholas Kreen and Rattler you believe are fictitious based on some sort of other certain --

A. Sun Biz, I know I checked Sun Biz. I definitely Googled them. I don't remember any other search engines.

Q. And also it shows some connection between her, or you believe it shows some connection between -- she was the contact person for the Hotel Duval purchase?

A. Yeah.

MR. HECHAVARRIA: And this is in Tallahassee, not in Jacksonville.

THE WITNESS: Yeah --

BY MR. LANDSMAN:

Q. Yeah, North Monroe and 415 North Monroe Street, Tallahassee, Florida?

A. Correct.

MR. HECHAVARRIA: I just wanted to make sure because you were somewhat confused at the last deposition.

MR. LANDSMAN: Well, some hotels are in multiple locations, addresses, and special billing, they can do that. I believe Best Western or something like that, different hotel chains, type of thing. For the record, that is a thing.

BY MR. LANDSMAN:

Q. The subpoena that was too broad that got easily kicked back by PayPal, was that put into evidence as well?

A. Which one? I have two subpoenas.

Q. It's the paragraph right before the 4/20/17. It

says I received response from PayPal, the subpoena is too broad.

A. Okay. I'm sorry. What was the question?

Q. The original one, turned over to the state attorney's office, the one that was kicked back?

A. I wouldn't think so.

Q. All right.

A. No.

Q. Do you still have a copy of it?

A. I can check.

Q. Yeah. Could you forward that one and the completed one to the state?

A. Yes. I included everything from PayPal on that disk.

MR. HECHAVARRIA: On the disk?

THE WITNESS: Yeah.

MR. HECHAVARRIA: Okay.

THE WITNESS: And then I believe it should all be on that disk.

MR. LANDSMAN: Okay.

THE WITNESS: Yes. Because I included all of the subpoenas.

BY MR. LANDSMAN:

Q. All right. And then near the end of the report, I then placed the following items into GPD property. Do you

think you fully described everything you put in there?

A. Yeah, to the best of my knowledge. I mean I obviously didn't purposely leave anything out.

Q. Okay. So Sprint's response is like there are CE's in evidence. I get it.

A. Yes. They should all have, yeah. I tried to make it as user-friendly as possible but again, I'm not (indiscernible).

Q. What does COG stand for?

A. City of Gainesville.

Q. City of Gainesville. All right. 5/1 you describe the search of the items you found that you thought were significant in the bag?

A. Correct. Yes, sir.

Q. In 5/2 you describe an electronic response from PayPal and it makes it sound like there's more than one account in Clark's name? Does that sound right?

A. Let me see. I would have to review that. I don't recall specifically.

Q. Okay. Would everything from here, I received in response contain most of the documents, would that all be on the CD from PayPal?

A. Yes, yes.

Q. I have no other questions.

MR. HECHAVARRIA: I have no further questions.

MR. LANDSMAN: Do want to read or waive?

THE WITNESS: Waive.

MR. LANDSMAN: Is that a waive? Really? That's a waive.

(The deposition was concluded at approximately 5:00 p.m.)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF ALACHUA)

I, Barbara J. Enneking, CVR-M, Certified Electronic Transcriber, do hereby certify that the digitally recorded deposition of Visvambhara Nicoloff, taken on April 29, 2019, in the case of the State of Florida versus Natwaina Sharee Clark, pending in the Circuit Court of the Eighth Judicial Circuit in and for Alachua County, Florida, Case No. 01-2017-CF-1221-A, was transcribed by me and that the foregoing constitutes a true and accurate transcription of said deposition.

DATED the 10th day of May, 2019.

_____
Barbara J. Enneking, CVR-M
Florida Digital Reporting, Inc.
209 SW 2nd Street
Gainesville, Florida 32601
352-336-0963

927 So.2d 1011
District Court of Appeal of Florida,
Second District.

STATE of Florida, Appellant,
v.
Don C. VANDERHORS, Appellee.

No. 2D05–1494.
|
April 19, 2006.

Synopsis

Background: State appealed from order of the Circuit Court for Hillsborough County, Rex Martin Barbas, J., suppressing evidence obtained by police during execution of search warrant.

The District Court of Appeal, Wallace, J., held that factual allegations in search warrant affidavit were sufficient for issuing magistrate to find fair probability that contraband would be found at the residence.

Reversed and remanded.

Attorneys and Law Firms

***1012** Charles J. Crist, Jr., Attorney General, Tallahassee, and Richard M. Fishkin, Assistant Attorney General, Tampa, for Appellant.

James Marion Moorman, Public Defender, and Lisa Lott, Assistant Public Defender, Bartow, for Appellee.

Opinion

WALLACE, Judge.

The State challenges an order suppressing evidence obtained by the police during the execution of a search warrant. The trial court ruled that the affidavit filed in support of the search warrant was fatally defective because it failed to demonstrate probable cause. After careful consideration of the affidavit, we reverse the suppression order.

On May 20, 2004, Officer Gary Garboski and Officer Selser Pickett of the Tampa Police Department filed an affidavit in support of a requested search warrant. To establish a probable cause basis for the issuance of the warrant, the officers stated the following facts:

> 5. Between the week of May 9th and the 13th day of May 2004 Affiant's [sic] met with a Tampa Police Department confidential informant, hereafter referred [to] as CI, who stated that an unknown black male was keeping and selling crack cocaine from within 1918 West Palmetto Street. CI is a drug user and has purchased crack cocaine from within this residence in the past. CI has been working with affiant's [sic] and has given credible and verified information in the past leading to several successful search warrants where felony arrests were affected and over twenty (20) grams of crack cocaine and money were recovered.
>
> 6. To further verify the information given by CI your affiant's [sic] caused the CI to be searched finding no money or illegal controlled substances. The CI was supplied with a predetermined amount of TPD investigative funds. Affiant Garboski went with CI to 1918 W[.] Palmetto St[.] and watched CI purchase crack cocaine from an unknown black male at this residence. The substance was given to affiant and field tested positive as crack cocaine. The substance was placed into the TPD property section.
>
> 7. For a period of two days your affiant's [sic] conducted visual surveillance at [1918] West Palmetto Street and observed numerous drug transactions from this residence. This location has also been the target of several citizen ***1013** complaints reference [sic] narcotic related activity along with a formal complaint that came in through the Tampa Police Department QUAD Hotline. Affiant's [sic] were contacted by Officer Chad Hughes of the Tampa Police Department QUAD squad who had also conducted a controlled purchase of crack cocaine from this residence.

Based on the affidavit, the magistrate issued the warrant on May 20, 2004. The officers executed the warrant the same day. The search resulted in the discovery of cocaine and drug paraphernalia.

In its order granting Vanderhors' motion to suppress the drug evidence, the trial court concluded that the affidavit failed to demonstrate probable cause because it did not indicate when the confidential informant (CI) observed the contraband or provide the dates when the controlled buys and surveillance occurred. In reaching this conclusion, the trial court relied on this court's decisions

in *Getreu v. State,* 578 So.2d 412 (Fla. 2d DCA 1991); *Rand v. State,* 484 So.2d 1367 (Fla. 2d DCA 1986); and *King v. State,* 410 So.2d 586 (Fla. 2d DCA 1982).

A search warrant must be based on probable cause supported by an affidavit. Art. I, § 12, Fla. Const. To establish probable cause, the affidavit must set forth two elements: (1) the commission element—that a particular person has committed a crime—and (2) the nexus element—that evidence relevant to the probable criminality is likely to be located at the place searched. *Burnett v. State,* 848 So.2d 1170, 1173 (Fla. 2d DCA 2003). In considering the sufficiency of the affidavit to demonstrate probable cause, the magistrate must examine the totality of the circumstances. The United States Supreme Court has defined the task of the magistrate as follows:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). On a motion to suppress the fruits of a search in accordance with a warrant, a trial court examines whether the issuing magistrate had a substantial basis for concluding that probable cause existed, and this determination is made by examining the affidavit in its entirety. *Garcia v. State,* 872 So.2d 326, 329 (Fla. 2d DCA 2004). The trial court should not disturb the issuing magistrate's determination absent a clear demonstration of an abuse of discretion. *State v. Gonzalez,* 884 So.2d 330, 333 (Fla. 2d DCA 2004). On appeal, the trial court's determination of the legal issue of probable cause is subject to de novo review. *Pagan v. State,* 830 So.2d 792, 806 (Fla.2002).

The issue before this court is whether the factual allegations in the affidavit were sufficient for the issuing magistrate to find a fair probability that contraband would be found at the residence. The trial court found two fatal omissions in the affidavit: (1) paragraph 5 did not include the date on which the CI observed contraband in the residence and (2) paragraphs 6 and 7 did not indicate when the controlled buys occurred. In our review of the trial court's findings, we will first address the omission from paragraph 5 of the date when the CI observed the illegal activity.

In the cases relied on by the trial court, this court addressed the issue of an affidavit's ***1014** lack of a factual basis to show when an informant observed the alleged illegal activity at the dwelling in question. In *Getreu,* the affidavit alleged that "[d]uring the week of December 6, 1987, confidential informant 87–26 ... did contact your affiant and advised your affiant that a white male known by the confidential informant only as David ... is in possession of approximately eighty-four (84) grams of cocaine, as personally observed by the confidential informant." 578 So.2d at 413. Although the affidavit pinpointed the date on which the informant spoke to the affiant, it did not indicate when the informant saw David in possession of cocaine. *Id.* at 414. This court held that because the affidavit failed to show when the informant observed David in possession of cocaine, it fell short of the constitutional requirements for determining the existence of probable cause. *Id.* at 413; *see also Rand,* 484 So.2d 1367 (holding that an affidavit containing no allegation of when the informants observed the marijuana on appellant's premises was insufficient); *King,* 410 So.2d 586 (holding that an affidavit supporting a search warrant must contain the specific time when the informant observed illegal activity).

Although the affidavit in this case states that the affiant met with the CI "[b]etween the week of May 9th and the 13th," nothing in paragraph 5 indicates when the CI saw the contraband within Vanderhors' residence. Based on the teaching of *Getreu, Rand,* and *King,* we conclude that the trial court correctly found that the allegations in paragraph 5 did not provide a factual basis for the issuing magistrate to find probable cause. Because we agree with the trial court's analysis on this point, our focus turns to whether the factual allegations in paragraphs 6 and 7 were sufficient for the issuing magistrate to find a fair probability that contraband would be found in the residence.

In paragraph 6, the officers recounted the events of a controlled buy supervised by Officer Garboski. In paragraph 7, the officers stated that they were contacted by Officer Chad Hughes who had also conducted a controlled purchase of crack cocaine from the residence. On this point, the State argues that the dates of the controlled buys were not essential because one of the buys had to have been made within eleven days before the issuance of the warrant.

To establish the nexus element—that evidence relevant to the probable criminality is likely to be located at the place searched—an affidavit for a search warrant must state the specific time when the illegal activity that forms the basis for probable cause was observed. *State v. Jenkins,* 910 So.2d 934, 937 (Fla. 2d DCA 2005). The date of the observation is important to the probable cause determination for this reason:

> "The length of time between the events relied upon to obtain a search warrant and the date of issuance bears upon probable cause. Generally, as the time period increases there is less likelihood that the items sought to be seized will be found on the premises described in the warrant."

Haworth v. State, 637 So.2d 267, 267 (Fla. 2d DCA 1994) (citation omitted) (quoting *Smith v. State,* 438 So.2d 896, 897–98 (Fla. 2d DCA 1983)).

Recently, this court found in *Jenkins* that an affidavit established that the evidence was still likely to be located at the place to be searched despite the omission from the affidavit of an express statement concerning when the informant found the evidence. 910 So.2d at 938. On May 15, 2002, Jenkins videotaped himself fondling a minor's breasts. *Id.* at 936. On May 16, the minor reported Jenkins to the police, ***1015** Jenkins' employer notified police that she found a video of Jenkins with the minor on Jenkins' computer, and the detective submitted the warrant application. *Id.* at 935–36. Although the affidavit did not indicate when Jenkins' employer found the video, the fact that the affidavit was filed within one day of the illegal activity made it likely that the video was still on the premises. *Id.* at 938. This court concluded that the affidavit was sufficient to establish probable cause to issue a warrant for the search of Jenkins' computer. *Id.*

The timeline of events in this case is not as straightforward as the timeline in *Jenkins.* Paragraph 5 establishes that the officers met with the CI between May 9 and May 13, 2004. Paragraph 6 relates that "[t]o further verify the information given by CI" the officers performed a controlled buy. Paragraph 7 states that the officers conducted surveillance of the residence for a period of two days and that Officer Hughes had conducted his own controlled buy. The affidavit was filed on May 20, 2004.

The facts alleged in paragraph 7 are insufficient alone to establish that it was likely that the contraband would be found at the residence. Without a reference to a date or time period, the officers' surveillance and Officer Hughes' controlled buy could have occurred at any time. Nevertheless, after applying the totality of the circumstances test established by the Supreme Court in *Gates,* 462 U.S. at 238, 103 S.Ct. 2317, the language in paragraph 6 renders the affidavit sufficient. It is logical to conclude that the "[t]o further verify the information given by CI" language relates directly to the information provided by the CI to the officers between May 9 and 13. Reading paragraphs 5 and 6 together, the controlled buy cannot have occurred any earlier than May 9, eleven days before the filing of the affidavit and warrant application. Consistent with Florida Supreme Court precedent, a controlled buy occurring within this time period provides sufficient probable cause to issue a search warrant. *See State v. Gieseke,* 328 So.2d 16 (Fla.1976) (holding that a controlled buy conducted within ten days of the warrant application alone is a sufficient factual basis from which a magistrate could conclude that contraband remains on the premises). Therefore, given the circumstances described in the affidavit, the issuing magistrate could have concluded that there was a fair probability that contraband would have been found at the searched residence. In reaching this conclusion, we adhere to the principle that the resolution of marginal cases should be largely determined by the strong preference for searches conducted pursuant to a warrant. *See Gates,* 462 U.S. at 237 n. 10, 103 S.Ct. 2317; *Doorbal v. State,* 837 So.2d 940, 952 (Fla.2003); *State v. Stevenson,* 707 So.2d 902, 903 (Fla. 2d DCA 1998).

Because the totality of the circumstances indicates that the affidavit presented the issuing magistrate with probable cause to conclude that contraband would be found at the residence, there was no Fourth Amendment violation and the search warrant was valid. Accordingly, we reverse the trial court's order granting Vanderhors' motion to suppress the evidence seized, and we remand for further proceedings.

Reversed and remanded.

DAVIS and SILBERMAN, JJ., Concur.

All Citations

927 So.2d 1011, 31 Fla. L. Weekly D1083

31 Fla. L. Weekly D1083

End of Document

848 So.2d 1170
District Court of Appeal of Florida,
Second District.

Jon Paul BURNETT, Appellant,
v.
STATE of Florida, Appellee.

No. 2D01–5527.
|
May 16, 2003.
|
Rehearing Denied July 2, 2003.

Synopsis
Defendant was convicted in the Circuit Court, Polk County, Dennis P. Maloney and Judith J. Flanders, JJ., of two counts of lewd or lascivious conduct and over one hundred counts of possession of child pornography. Defendant appealed. The District Court of Appeal, Casanueva, J., held that the officer's affidavit was insufficient to support conclusion that evidence relevant to defendant's possession of child pornography was likely located in his bedroom.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

***1171** Michael P. McDaniel of C. Ray McDaniel, P.A., Bartow, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Susan D. Dunlevy, Assistant Attorney General, Tampa, for appellee.

Opinion

CASANUEVA, Judge.

Jon Paul Burnett was convicted of two counts of lewd or lascivious conduct[1] and over one hundred counts of possession of child pornography.[2] The child pornography charges stemmed from law enforcement's seizure of his computer and numerous diskettes in his bedroom. We affirm his convictions for lewd or lascivious conduct, but because the affidavit in support of the search warrant was fatally defective, we reverse the convictions for possession of child pornography and remand for resentencing.

Facts

This case began when the father of two boys, ages nine and twelve, contacted a Polk County Sheriff's Office detective with his concern that Mr. Burnett had engaged in inappropriate behavior with his children. The father related his suspicion that Mr. Burnett videotaped his children while they were not wearing any clothing. In a subsequent interview the children told the detective that Mr. Burnett had asked them to remove their clothes and wrap themselves in clear plastic wrap so that he could videotape a temporary tattoo on their buttocks. Additionally, he asked them to place clear plastic wrap on the toilet, then to use the toilet and deliver the plastic wrap to him, and to place quarters in their rectums and shake them out. The children denied that any videotaping actually occurred.

Armed with this information, detectives then contacted Mr. Burnett, who drove to a sheriff's office substation for an interview. There he advised the deputies that he had videotaped the boys but that he had either discarded or recorded over the tape. Upon discovering that Mr. Burnett rented a bedroom from his parents at their residence, the detectives obtained his consent to search his room. Among the targets of their search were the video camera and any videotape of the boys. During the search, Mr. Burnett showed the deputies the camera, demonstrated how it worked, but stated that the tape was not in the camera. Noticing that the camera had no power, a deputy plugged it in, hit the play mode, and watched a videotape that matched the father's allegations. Both the video camera and tape were seized as evidence and the room was searched. Nothing else was seized.

The following day one of the detectives applied for a warrant to search the entire residence. Among the matters set out in the affidavit were the following:

> (1) Your affiant is a duly appointed law enforcement official employed by the Polk County Sheriff's Office. Your affiant is currently a detective assigned to the Bureau of Criminal Investigations in the Sexual Abuse

And Family Exploitation Unit. Your affiant has been employed *1172 for over three years at the Polk County Sheriff's Office. I have been assigned to the S.A.F.E. Unit for approximately one year. My duties are to investigate any activity involving sex crimes, child abuse, and family exploitation in Polk County, Florida. Your affiant has received specialized training in investigating sex crimes, specifically the Institute of Police Technology and Management course focusing on sexually exploited children and juvenile victims of sexual abuse. This affiant attended the Polk County conference on Sexual Abuse that specialized in recognizing victims of sexual abuse and interviewing them. Your affiant has received specialized training in child injury and death investigations as well as a course on interview and interrogations and search warrant preparations. Your affiant has conducted over two hundred investigations involving crimes against children and has made over thirty arrests as a direct result of these investigations. Your affiant has previously either written or assisted in the execution of four search warrants.

* * * *

(7) Based on my expertise and training, people involved in child pornography (as in this case video taping a juvenile's genitals and buttocks) commonly are involved with receiving or transmitting like images of children engaged in sexual performances on their computer. It is not unusual for a suspect to retain images on their computer even when they are under suspicion of committing crimes against children. Furthermore, the majority of people utilizing computers are unable to erase these images from their hard drive. These images can be retrieved during forensic analysis even after an attempt has been made to erase the images. Consequently, I believe there are images related to children involved in sexual performances and/or child pornography as defined in F.S.S. 827.071 still contained on the computer located at the place to be searched. Your affiant also believes due to the suspect's untruthful statements on whether he kept pornographic images on tape (which I viewed), it is believed other child pornographic images may be stored on numerous video tapes located in the suspect's bedroom, the place to be searched.

Based upon this affidavit a judge issued the warrant, and deputies seized Mr. Burnett's computer and numerous diskettes. Mr. Burnett's motion to suppress based upon lack of probable cause in the warrant was denied.

Among the evidence introduced at trial was the testimony of a computer forensics expert, Mr. Gates, who testified that, upon his technical examination using specialized software, the seized diskettes revealed that they at one time had held images, but all of the pictures had been deleted or erased. Mr. Gates's examination could not ascertain when or by whom the images had been deleted. Furthermore, Mr. Gates recovered no images—deleted or otherwise—from the hard drive of Mr. Burnett's computer. However, Mr. Burnett possessed a computer diskette for a program called Paint Shop Pro that can be used to view and manipulate images, and Mr. Gates discovered that someone at some unspecified time had used this program to view at least two pornographic images on Mr. Burnett's computer.

To counter this circumstantial evidence that he possessed child pornography, Mr. Burnett adduced testimony from a friend who was present when Mr. Burnett received a package through an e-Bay auction containing diskettes that he had not specifically ordered. Mr. Burnett's theory of *1173 innocence was that he did not know what was on the diskettes when they arrived, that he had never viewed the images on them, and that someone else could have deleted the images before the diskettes ever came into his possession. Similarly, Mr. Burnett attacked the charges stemming from the images viewed through the Paint Shop Pro program on the ground that there was no evidence demonstrating that he actually viewed or manipulated the recovered images.

Although we have misgivings about the sufficiency of the evidence to sustain the possession of child pornography charges, we do not need to reach that issue. On this appeal we reverse the finding that the detectives had probable cause to search for and to seize Mr. Burnett's computer and the diskettes. Consequently, we reverse the convictions on 136 counts of possession of child pornography that flowed from the illegal seizure of those items.

Analysis

The Fourth Amendment to the United States Constitution recognizes the right of the people to be protected from the government's unreasonable searches and seizures and mandates that no search warrant shall issue "but upon

probable cause, supported by oath or affirmation...." U.S. Const. amend. IV. The Constitution of the State of Florida similarly protects against unreasonable searches and seizures by the government: "No warrant shall be issued except upon probable cause, supported by affidavit...." Art. I, § 12, Fla. Const. To further these constitutional imperatives, our legislature has decreed:

> No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some creditable witness that he or she has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based.

§ 933.18(10), Fla. Stat. (1999). In implementing these constitutional mandates,

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Thus, the affidavit in the warrant application must satisfy two elements: first, that a particular person has committed a crime—the commission element, and, second, that evidence relevant to the probable criminality is likely located at the place to be searched—the nexus element. *United States v. Vigeant,* 176 F.3d 565, 569 (1st Cir.1999). As stated in *Gates,* wholly conclusory statements fail to meet the probable cause requirement; the reviewing magistrate cannot abdicate his or her duty and become a mere ratifier of the bare conclusions of others. *Gates,* 462 U.S. at 238, 103 S.Ct. 2317. And, pursuant to *Gates,* as the reviewing court we are required to ensure that a substantial basis existed to support the magistrate's probable cause determination. *Id.* at 238–39, 103 S.Ct. 2317.

Our initial analytical focus will be upon the nexus element of the warrant application. We must measure the affidavit's averments to determine whether evidence relevant to Mr. Burnett's probable criminality—possession of child pornography—was likely located at the place to be searched, that is, his bedroom. Because the affidavit failed to set forth crime-specific facts regarding Mr. Burnett's probable ***1174** possession of child pornography and the likelihood that it would be found on the computer and diskettes in his bedroom, we conclude that the warrant application failed. *See King v. State,* 779 So.2d 385, 386 (Fla. 2d DCA 2000) (holding that the probable cause statement was totally devoid of any facts leading to the conclusion that probable cause existed to believe that stolen property would be found at the places to be searched).

Although the affidavit in this case properly stated that the seized videotape substantiated the allegations of Mr. Burnett's lewd or lascivious conduct with children, the videotape corroborated only those initial charges and nothing more. The affidavit recited the deputy's observation that videos and magazines were stacked about the bedroom, yet it failed to affirm that the title or cover of any video or magazine suggested it contained child pornography. This is despite the fact that the detective and other law enforcement personnel had already consensually searched the very bedroom in question—a fact also omitted from disclosure to the magistrate.

Furthermore, the general information set forth in paragraphs one and seven of the affidavit manifested no factual foundation for the magistrate's conclusion that probable cause existed in this case. The initial complaint was that Mr. Burnett made a lewd videotape of two young boys, but nothing was elicited suggesting that the father believed Mr. Burnett used his computer to transmit or store images of child pornography. The affidavit contained no specific facts linking Mr. Burnett to this particular criminal conduct; it failed to describe a factual link between the video camera and the functioning capability of the home computer so that images could be transferred. The affidavit also omitted any factual averment that the computer was linked to the internet or that the video camera was compatible with the computer so that images could be downloaded, transferred, or transmitted.

Rather, in this case the affiant averred in only general terms that she had conducted over two hundred investigations involving crimes against children, resulting

in over thirty arrests, but she recited no specific experiences in child pornography matters or arrests she had made for this particular crime. Essentially, the affiant failed to describe any personal experience with child pornography from which her conclusions concerning Mr. Burnett were derived. Instead, the affidavit included language such as "[b]ased on my expertise," "commonly are involved," and "it is not unusual." To determine probable cause, the magistrate is required to evaluate whether the case-specific facts yield a legal conclusion that probable cause exists. Here, the affiant's education and experience in matters of child pornography were not set out, nor did the affiant indicate the degree of commonality that is alleged to exist. Although it may not be unusual for suspects such as Mr. Burnett to retain child pornography images, the question is—factually—to what degree that propensity could be attributed to him.

The magistrate's duty is to examine the affidavit for facts and fact-based conclusions. An affidavit is not limited to the affiant's personal knowledge; in some instances information from confidential informants or scientific evidence can be presented. In the same vein, information from experts in the field, such as child pornography, may be made available to the magistrate for consideration, whether it be by scientific studies, statistical analysis, or the like. *See United States v. Ventresca,* 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965) (holding that "hearsay may be the basis for issuance of the warrant' so long as there ... [is] a substantial basis ***1175** for crediting the hearsay' " (citing *Jones v. United States,* 362 U.S. 257, 272, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), *overruled on other grounds, United States v. Salvucci,* 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980))); *see also United States v. Isgut,* No. 95–6199 CR Lenard, 1996 WL 775064 (S.D.Fla. Jul. 23, 1996) (voiding a search warrant for lack of probable cause based on staleness but criticizing the affiant's failure to include specific information about the training he had received and the source of his information concerning "five characteristics of those who are considered 'collectors of child pornography' "). Unfortunately, no scientific information or expert opinion evidence was included in this affidavit for the magistrate's consideration.

In paragraph seven, the affiant described her belief in the generalized behavior of other persons who receive or transmit images of children and who are unable to erase the contents of their computers. From this generalized information, which contained no link to criminal conduct by Mr. Burnett, the officer concluded that Mr. Burnett's computer contained pornographic images. Probable cause analysis focuses not on the evidence that is found as a result of the search but on facts known at the moment of seizure. *See State v. Bond,* 341 So.2d 218, 218 (Fla. 2d DCA 1976) ("Probable cause for issuance of a search warrant is determined solely with reference to facts stated in the warrant and supporting affidavit."). Here, the conclusion that images remained on Mr. Burnett's computer was not supported by the factual allegations of the affidavit. The fact that Mr. Burnett might have lied about or misrepresented the existence of the video of the children established, in this instance, only his questionable veracity; it did not substantiate his commission of another criminal offense. In contrast, in *Schmitt v. State,* 590 So.2d 404, 411 (Fla.1991), in which the supreme court sustained the probable cause determination in a warrant issued to search the defendant's home for evidence of the defendant's knowing possession of child pornography, § 827.071(5), Fla. Stat. (1987), the affidavit revealed that the defendant "made nudity a central and almost obsessive object of his attention" and that "this overall focus of Schmitt's conduct tended to show a lewd intent and thus created a substantial basis for believing that the search would fairly probably yield evidence" that the defendant had violated the laws prohibiting possession of child pornography. The *Schmitt* affidavit alleged that the defendant had taken numerous nude photographs of his daughter over a four-year period beginning when the child was eight years old; that the father had taken photographs of a nude adult female in the presence of the child; that the father had videotaped the daughter and a friend "stripping down to their panties" and "swimming in the nude"; and that the father kept photographs, film, cameras, a television, and a videocassette recorder in the place to be searched. *Schmitt,* 590 So.2d at 408. In Mr. Burnett's case, however, no details in the affidavit supported a conclusion that Mr. Burnett possessed pornographic videotapes, photographs, or computer images other than the single tape that the authorities already possessed. Any conclusion that his room contained other evidence of his possession of pornographic materials was based on mere suspicion.

Years ago, the Supreme Court examined another affiant's statement that he had "cause to suspect and [did] believe" that liquor illegally brought into the United States was located on certain premises. *Nathanson v. United States,* 290 U.S. 41, 44, 54 S.Ct. 11, 78 L.Ed. 159 (1933). That wholly conclusory statement was rejected as a foundation for probable cause. Similarly, ***1176** we must reject the wholly conclusory statements made here.

Conclusion

We recognize that normally the averments of an experienced officer are accorded some weight. To be given that deference, however, the officer's conclusions must be grounded upon some particular evidence. As stated in *Churney v. State,* 348 So.2d 395, 397 (Fla. 3d DCA 1977), "an affidavit in support of a search warrant for a private dwelling must show probable cause on its face.... Probable cause for issuance of a search warrant cannot be based on mere suspicion, but rather must be based on facts known to exist." The affidavit and search warrant in this case cannot withstand scrutiny under the test of case law, section 933.18(10), or the Florida or federal constitutions.

Because we have resolved this case on the sufficiency of the affidavit, it is not necessary to address the equally difficult question of whether possession of a computer diskette that contained deleted images of child pornography retrievable only through efforts of a computer forensics expert is sufficient evidence to sustain a conviction for possession of child pornography.

Affirmed in part, reversed in part, and remanded for resentencing.

ALTENBERND, C.J., and WHATLEY, J., Concur.

All Citations

848 So.2d 1170, 28 Fla. L. Weekly D1179

Footnotes

1 § 800.04(6), Fla. Stat. (1999).

2 § 827.071(5), Fla. Stat. (1999).

98 S.Ct. 2674
Supreme Court of the United States

Jerome FRANKS, Petitioner,
v.
State of DELAWARE.

No. 77–5176.
|
Argued Feb. 27, 1978.
|
Decided June 26, 1978.

Synopsis
Defendant was convicted before the Superior Court of first degree rape, second-degree kidnapping, and first-degree burglary, and he appealed. The Delaware Supreme Court, 373 A.2d 578, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Blackmun, held that where defendant makes substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by affiant in search warrant affidavit, and if allegedly false statement is necessary to the finding of probable cause, Fourth Amendment requires that a hearing be held at defendant's request.

Reversed and remanded.

Mr. Justice Rehnquist dissented and filed opinion in which Mr. Chief Justice Burger joined.

****2675 *154** *Syllabus**

Prior to petitioner's Delaware state trial on rape and related charges and in connection with his motion to suppress on Fourth Amendment grounds items of clothing and a knife found in a search of his apartment, he challenged the truthfulness of certain factual statements made in the police affidavit supporting the warrant to search the apartment, and sought to call witnesses to prove the misstatements. The trial court sustained the State's objection to such proposed testimony and denied the motion to suppress, and the clothing and knife were admitted as evidence at the ensuing trial, at which petitioner was convicted. The Delaware Supreme Court affirmed, holding that a defendant under *no* circumstances may challenge the veracity of a sworn statement used by police to procure a search warrant. *Held* : Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request. The trial court here therefore erred in refusing to examine the ****2676** adequacy of petitioner's proffer of misrepresentation in the warrant affidavit. Pp. 2676–2677, 2681–2685.

(a) To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. The allegation of deliberate falsehood or of reckless disregard must point out specifically with supporting reasons the portion of the warrant affidavit that is claimed to be false. It also must be accompanied by an offer of proof, including affidavits or sworn or otherwise reliable statements of witnesses, or a satisfactory explanation of their absence. P. 2685.

(b) If these requirements as to allegations and offer of proof are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required, but if the remaining content is insufficient, the defendant is entitled under the Fourth and Fourteenth Amendments to a hearing. P. 2685.

***155** (c) If, after a hearing, a defendant establishes by a preponderance of the evidence that the false statement was included in the affidavit by the affiant knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit. P. 2676.

373 A.2d 578, reversed and remanded.

Attorneys and Law Firms

Argued by Donald W. Huntley, Wilmington, Del., for petitioner.

Harrison F. Turner, Smyrna, Del., for respondent.

Opinion

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents an important and longstanding issue of Fourth Amendment law. Does a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?

In the present case the Supreme Court of Delaware held, as a matter of first impression for it, that a defendant under *no* circumstances may so challenge the veracity of a sworn statement used by police to procure a search warrant. We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was ***156** included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

I

The controversy over the veracity of the search warrant affidavit in this case arose in connection with petitioner Jerome Franks' state conviction for rape, kidnaping, and burglary. On Friday, March 5, 1976, Mrs. Cynthia Bailey told police in Dover, Del., that she had been confronted in her home earlier that morning by a man with a knife, and that he had sexually assaulted her. She described her assailant's age, race, height, build, and facial hair, and gave a detailed description of his clothing as consisting of a white thermal undershirt, ****2677** black pants with a silver or gold buckle, a brown leather three-quarter-length coat, and a dark knit cap that he wore pulled down around his eyes.

That same day, petitioner Franks coincidentally was taken into custody for an assault involving a 15-year-old girl, Brenda B. _____, six days earlier. After his formal arrest, and while awaiting a bail hearing in Family Court, petitioner allegedly stated to Robert McClements, the youth officer accompanying him, that he was surprised the bail hearing was "about Brenda B. _____. I know her. I thought you said Bailey. I don't know her." Tr. 175, 186. At the time of this statement, the police allegedly had not yet recited to petitioner his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

***157** On the following Monday, March 8, Officer McClements happened to mention the courthouse incident to a detective, Ronald R. Brooks, who was working on the *Bailey* case. Tr. 186, 190–191. On March 9, Detective Brooks and Detective Larry D. Gray submitted a sworn affidavit to a Justice of the Peace in Dover, in support of a warrant to search petitioner's apartment.[1] In paragraph 8 of the affidavit's "probable cause page" mention was made of petitioner's statement to McClements. In paragraph 10, it was noted that the description of the assailant given to the police by Mrs. Bailey included the above-mentioned clothing. Finally, the affidavit also described the attempt made by police to confirm that petitioner's typical outfit matched that of the assailant. Paragraph 15 recited: "On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people." Paragraphs 16 and 17 respectively stated: "Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket," and "Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat."

The warrant was issued on the basis of this affidavit. App. 9. Pursuant to the warrant, police searched petitioner's apartment and found a white thermal undershirt, a knit hat, dark pants, and a leather jacket, and, on petitioner's kitchen table, a single-blade knife. All these ultimately were introduced in evidence at trial.

Prior to the trial, however, petitioner's counsel filed a written motion to suppress the clothing and the knife found in the search; this motion alleged that the warrant on its face did not show probable cause and that the search and seizure were ***158** in violation of the Fourth

and Fourteenth Amendments. *Id.*, at 11–12. At the hearing on the motion to suppress, defense counsel orally amended the challenge to include an attack on the veracity of the warrant affidavit; he also specifically requested the right to call as witnesses Detective Brooks, Wesley Lucas of the Youth Center, and James D. Morrison, formerly of the Youth Center.[2] *Id.*, at 14–17. Counsel asserted that Lucas and Morrison would testify that neither had been personally interviewed by the warrant affiants, and that, although they might have talked to another police officer, any information given by them to that officer was "somewhat different" from what was recited in the affidavit. **2678 *Id.*, at 16. Defense counsel charged that the misstatements were included in the affidavit not inadvertently, but in "bad faith." *Id.*, at 25. Counsel also sought permission to call Officer McClements and petitioner as witnesses, to seek to establish that petitioner's courthouse statement to police had been obtained in violation of petitioner's *Miranda* rights, and that the search warrant was thereby tainted as the fruit of an illegally obtained confession. *Id.*, at 17, 27.

In rebuttal, the State's attorney argued in detail, App. 15–24, (a) that Del.Code Ann., Tit. 11, §§ 2306, 2307 (1974), contemplated that any challenge to a search warrant was to be limited to questions of sufficiency based on the face of the affidavit; (b) that, purportedly, a majority of the States whose *159 practice was not dictated by statute observed such a rule;[3] and (c) that federal cases on the issue were to be distinguished because of Fed.Rule Crim.Proc. 41(e).[4] He also noted that *160 this Court had reserved the general issue of subfacial challenge to veracity in *Rugendorf v. United States*, 376 U.S. 528, 531–532, 84 S.Ct. 825, 827–828, 11 L.Ed.2d 887 (1964), when it disposed of that case on the ground that, even if a veracity challenge were permitted, the alleged factual inaccuracies in that case's affidavit "were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." *Id.*, at 532, 84 S.Ct., at 828. The State objected to petitioner's "going behind [the warrant affidavit] in any way," and argued that the court must decide petitioner's motion "on the four corners" of the affidavit. App. 21.

The trial court sustained the State's objection to petitioner's proposed evidence. *Id.*, at 25, 27. The motion to suppress was denied, and the clothing and knife were admitted as evidence at the ensuing trial. Tr. 192–196. Petitioner was convicted. In a written motion for judgment of acquittal and/or new trial, Record Doc. No. 23, petitioner repeated his objection to the admission of the evidence, stating that he "should **2679 have been allowed to impeach the Affidavit used in the Search Warrant to show purposeful misrepresentation of information contained therein." *Id.*, at 2. The motion was denied, and petitioner was sentenced to two consecutive terms of 25 years each and an additional consecutive life sentence.

On appeal, the Supreme Court of Delaware affirmed. 373 A.2d 578 (1977). It agreed with what it deemed to be the "majority rule" that no attack upon the veracity of a warrant affidavit could be made:

"We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are *161 more properly considered in a trial on the merits." *Id.*, at 580.

Because of this resolution, the Delaware Supreme Court noted that there was no need to consider petitioner's "other contentions, relating to the evidence that would have been introduced for impeachment purposes." Ibid.

Franks' petition for certiorari presented only the issue whether the trial court had erred in refusing to consider his allegation of misrepresentation in the warrant affidavit.[5] Because of the importance of the question, and because of the conflict among both state and federal courts, we granted certiorari. 434 U.S. 889, 98 S.Ct. 261, 54 L.Ed.2d 174 (1977).

II

It may be well first to note how we are compelled to reach the Fourth Amendment issue proffered in this case. In particular, the State's proposals of an independent and adequate state ground and of harmless error do not dispose of the controversy.

Respondent argues that petitioner's trial counsel, who is not the attorney representing him in this Court, failed to include the challenge to the veracity of the warrant affidavit in the written motion to suppress filed before trial, contrary to the requirement of Del.Super.Ct.Rule Crim.Proc. 41(e) that a motion to suppress "shall state the grounds upon which it is made." The Supreme Court of Delaware, however, disposed of petitioner's Fourth Amendment claim on the merits. A ruling on the merits of a federal question by the highest state court leaves the

federal question open to review ***162** in this Court. *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134, 34 S.Ct. 874, 877, 58 L.Ed. 1245 (1914); *Raley v. Ohio*, 360 U.S. 423, 436–437, 79 S.Ct. 1257, 1265–1266, 3 L.Ed.2d 1344 (1959); *Boykin v. Alabama*, 395 U.S. 238, 241–242, 89 S.Ct. 1709, 1711–1712, 23 L.Ed.2d 274 (1969).

Respondent next suggests that any error here was harmless. Assuming, *arguendo*, respondent says, that petitioner's Fourth Amendment claim was valid, and that the warrant should have been tested for veracity and the evidence excluded, it is still clear beyond a reasonable doubt that the evidence complained of did not contribute to petitioner's conviction. *Chambers v. Maroney*, 399 U.S. 42, 52–53, 90 S.Ct. 1975, 1981–1982, 26 L.Ed.2d 419 (1970). This contention falls of its own weight. The sole issue at trial was that of consent. Petitioner admitted, App. 37, that he had engaged in sexual relations with Mrs. Bailey on the day in question. She testified, Tr. 50–51, 69–70, that she had not consented to this, and that petitioner, upon first encountering her in the house, had threatened her with a knife to force her to submit. Petitioner claimed that she had given full consent and ****2680** that no knife had been present. *Id.*, at 254, 271. To corroborate its contention that consent was lacking, the State introduced in evidence a stainless steel, wooden-handled kitchen knife found by the detectives on the kitchen table in petitioner's apartment four days after the alleged rape. *Id.*, at 195–196; Magistrate's Return on the Search Warrant March 9, 1976, Record Doc. No. 23. Defense counsel objected to its admission, arguing that Mrs. Bailey had not given any detailed description of the knife alleged to be involved in the incident and had claimed to have seen the knife only in "pitch blackness." Tr. 195. The State obtained its admission, however, as a knife that matched the description contained in the search warrant, and Mrs. Bailey testified that the knife allegedly used was, like the knife in evidence, single-edged and not a pocket knife, and that the knife in evidence was the same length and thickness as the knife used in the crime. *Id.*, at 69, 114–115. The State carefully elicited from Detective Brooks the fact that this was the only knife found in petitioner's ***163** apartment. *Id.*, at 196. Although respondent argues that the knife was presented to the jury as "merely exemplary of the generic class of weapon testimonially described by the victim," Brief for Respondent 15–16, the State at trial clearly meant to suggest that this was the knife that had been used against Mrs. Bailey. Had the warrant been quashed, and the knife excluded from the trial as evidence, we cannot say with any assurance that the jury would have reached the same decision on the issue of consent, particularly since there was countervailing evidence on that issue.

We should note, in addition, why this case cannot be treated as was the situation in *Rugendorf v. United States*. There the Court held that no Fourth Amendment question was presented when the claimed misstatements in the search warrant affidavit "were of only peripheral relevancy to the showing of probable cause, *and*, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." 376 U.S., at 532, 84 S.Ct., at 828 (emphasis added). *Rugendorf* emphasized that the "erroneous statements . . . were not those of the affiant" and thus "fail[ed] to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant." *Id.*, at 533, 84 S.Ct., at 828.[6] Here, ***164** whatever the judgment may be as to the relevancy of the alleged misstatements, the integrity of the affidavit was directly placed in issue by petitioner in his allegation that the affiants did not, as claimed, speak directly to Lucas and Morrison. Whether such conversations took place is surely a matter "within the personal knowledge of the affiant[s]." We also might note that although respondent's brief puts forth that the alleged misrepresentations in the affidavit were of little importance in establishing probable cause, Brief for Respondent 16, respondent at oral argument appeared to disclaim any reliance on *Rugendorf*. Tr. of Oral Arg. 30.

III

Whether the Fourth and Fourteenth Amendments, and the derivative exclusionary ****2681** rule made applicable to the States under *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), ever mandate that a defendant be permitted to attack the veracity of a warrant affidavit after the warrant has been issued and executed, is a question that encounters conflicting values. The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search. In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." Judge Frankel, in *United States v. Halsey*, 257 F.Supp. 1002, 1005 (S.D.N.Y.1966), aff'd, Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a ***165** *truthful* showing" (emphasis in

original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law, see *Nathanson v. United States*, 290 U.S. 41, 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933); *Giordenello v. United States*, 357 U.S. 480, 485–486, 78 S.Ct. 1245, 1249–1250, 2 L.Ed.2d 1503 (1958); *Aguilar v. Texas*, 378 U.S. 108, 114–115, 84 S.Ct. 1509, 1513–1514, 12 L.Ed.2d 723 (1964), that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.' " *Id.*, at 114, 84 S.Ct., at 1514. Because it is the magistrate who must determine independently whether there is probable cause, *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, 368–369, 92 L.Ed. 436 (1948); *Jones v. United States*, 362 U.S. 257, 270–271, 80 S.Ct. 725, 735–736, 4 L.Ed.2d 697 (1960), it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment.

In saying this, however, one must give cognizance to competing values that lead us to impose limitations. They perhaps can best be addressed by noting the arguments of respondent and others against allowing veracity challenges. The arguments are several:

First, respondent argues that the exclusionary rule, created in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), is not a ***166** personal constitutional right, but only a judicially created remedy extended where its benefit as a deterrent promises to outweigh the societal cost of its use; that the Court has declined to apply the exclusionary rule when illegally seized evidence is used to impeach the credibility of a defendant's testimony, *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), is used in a grand jury proceeding, *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), or is used in a civil trial, *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); and that the Court similarly has restricted application of the Fourth Amendment exclusionary rule in federal habeas corpus review of a state conviction. See ****2682** *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Respondent argues that applying the exclusionary rule to another situation—the deterrence of deliberate or reckless untruthfulness in a warrant affidavit—is not justified for many of the same reasons that led to the above restrictions; interfering with a criminal conviction in order to deter official misconduct is a burden too great to impose on society.

Second, respondent argues that a citizen's privacy interests are adequately protected by a requirement that applicants for a warrant submit a sworn affidavit and by the magistrate's independent determination of sufficiency based on the face of the affidavit. Applying the exclusionary rule to attacks upon veracity would weed out a minimal number of perjurious government statements, says respondent, but would overlap unnecessarily with existing penalties against perjury, including criminal prosecutions, departmental discipline for misconduct, contempt of court, and civil actions.

Third, it is argued that the magistrate already is equipped to conduct a fairly vigorous inquiry into the accuracy of the factual affidavit supporting a warrant application. He may question the affiant, or summon other persons to give testimony at the warrant proceeding. The incremental gain from a post-search adversary proceeding, it is said, would not be great.

***167** Fourth, it is argued that it would unwisely diminish the solemnity and moment of the magistrate's proceeding to make his inquiry into probable cause reviewable in regard to veracity. The less final, and less deference paid to, the magistrate's determination of veracity, the less initiative will he use in that task. Denigration of the magistrate's function would be imprudent insofar as his scrutiny is the last bulwark preventing any particular invasion of privacy before it happens.

Fifth, it is argued that permitting a post-search evidentiary hearing on issues of veracity would confuse the pressing issue of guilt or innocence with the collateral question as to whether there had been official misconduct in the drafting of the affidavit. The weight of criminal dockets, and the need to prevent diversion of attention from the main issue of guilt or innocence, militate against such an added burden on the trial courts. And if such hearings were conducted routinely, it is said, they would be misused by defendants as a convenient source of discovery. Defendants might even use the hearings in an attempt to force revelation of the identity of informants.

Sixth and finally, it is argued that a post-search veracity challenge is inappropriate because the accuracy of an affidavit in large part is beyond the control of the affiant. An affidavit may properly be based on hearsay, on fleeting observations, and on tips received from unnamed informants whose identity often will be properly protected from revelation under *McCray v. Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967).

None of these considerations is trivial. Indeed, because of them, the rule announced today has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded. But neither do the considerations cited by respondent and others have a fully controlling weight; we conclude that they are insufficient to justify an *absolute* ban on post-search impeachment of veracity. On this side of the balance, also, there are pressing considerations:

***168** First, a flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning. The requirement that a warrant not issue "but upon probable cause, supported by Oath or affirmation," would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile. It is this specter of intentional falsification that, we think, has evoked such widespread opposition ****2683** to the flat nonimpeachment rule from the commentators,[7] from the American Law Institute in its Model Code of Pre-Arraignment Procedure, § SS290.3(1) (Prop. Off. Draft 1975), from the federal courts of appeals, and from state courts. On occasion, of course, an instance of deliberate falsity will be exposed and confirmed without a special inquiry either at trial, see *United States ex rel. Petillo v. New Jersey,* 400 F.Supp. 1152, 1171–1172 (NJ 1975), vacated and remanded by order *sub nom. Albanese v. Yeager,* 541 F.2d 275 (CA3 1976), or at a hearing on the sufficiency of the affidavit, cf. ***169** *United States v. Upshaw,* 448 F.2d 1218, 1221–1222 CA5 1971), cert. denied, 405 U.S. 934, 92 S.Ct. 970, 30 L.Ed.2d 810 (1972). A flat nonimpeachment rule would bar re-examination of the warrant even in these cases.

Second, the hearing before the magistrate not always will suffice to discourage lawless or reckless misconduct. The pre-search proceeding is necessarily *ex parte,* since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence. The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous. The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations. The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.

Third, the alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap. *Mapp v. Ohio,* implicitly rejected the adequacy of these alternatives. Mr. Justice Douglas noted this in his concurrence in *Mapp,* 367 U.S., at 670, 81 S.Ct., at 1699, where he quoted from *Wolf v. Colorado,* 338 U.S. 25, 42, 69 S.Ct. 1359, 1369, 93 L.Ed. 1782 (1949): " 'Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.' "

Fourth, allowing an evidentiary hearing, after a suitable preliminary proffer of material falsity, would not diminish the importance and solemnity of the warrant-issuing process. It is the *ex parte* nature of the initial hearing, rather than the magistrate's capacity, that is the reason for the review. A magistrate's determination is presently subject to review before trial as to *sufficiency* without any undue interference ***170** with the dignity of the magistrate's function. Our reluctance today to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard, leaves a broad field where the magistrate is the sole protection of a citizen's Fourth Amendment rights, namely, in instances where police have been merely negligent in checking or recording the facts relevant to a probable-cause determination.

****2684** Fifth, the claim that a post-search hearing will confuse the issue of the defendant's guilt with the issue of the State's possible misbehavior is footless. The hearing will not be in the presence of the jury. An issue extraneous to guilt already is examined in any probable-cause determination or review of probable cause. Nor, if a sensible threshold showing is required and sensible substantive requirements for suppression are maintained, need there be any new large-scale commitment of judicial resources; many claims will wash out at an early stage, and the more substantial ones in any event would require judicial resources for vindication if the suggested alternative sanctions were truly to be effective. The requirement of a substantial preliminary showing would suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction. And

because we are faced today with only the question of the integrity of the affiant's representations as to his own activities, we need not decide, and we in no way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made. *McCray v. Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), the Court's earlier disquisition in this area, concluded only that the Due Process Clause of the Fourteenth Amendment did not require the State to expose an informant's identity routinely, upon a defendant's mere demand, when there was ample evidence in the probable-cause hearing to show that the informant was reliable and his information credible.

Sixth and finally, as to the argument that the exclusionary ***171** rule should not be extended to a "new" area, we cannot regard any such extension really to be at issue here. Despite the deep skepticism of Members of this Court as to the wisdom of extending the exclusionary rule to collateral areas, such as civil or grand jury proceedings, the Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State's case where a Fourth Amendment violation has been substantial and deliberate. See *Brewer v. Williams,* 430 U.S. 387, 422, 97 S.Ct. 1232, 1251, 51 L.Ed.2d 423 (1977) (BURGER, C. J., dissenting); *Stone v. Powell,* 428 U.S., at 538, 96 S.Ct., at 3072 (WHITE, J., dissenting). We see no principled basis for distinguishing between the question of the sufficiency of an affidavit, which also is subject to a post-search re-examination, and the question of its integrity.

IV

In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless ***172** disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.[8] On the other ****2685** hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Because of Delaware's absolute rule, its courts did not have occasion to consider the proffer put forward by petitioner Franks. Since the framing of suitable rules to govern proffers is a matter properly left to the States, we decline ourselves to pass on petitioner's proffer. The judgment of the Supreme Court of Delaware is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT

J. P. Court # 7

IN THE MATTER OF: Jerome Franks, B/M, DOB: 10/9/54 and 222 S. Governors Ave., Apt. # 3, Dover, Delaware. A two room apartment located on the South side, second floor, of a white block building on the west side of S. Governors Avenue, Between Loockerman Street and North Street, in the City of Dover. The ground floor of this building houses Wayman's Barber Shop.
STATE OF DELAWARE) ss:

COUNTY OF KENT)

Be it remembered that on this 9th day of March A. D. ***173** 1976 before me John Green, personally appeared Det. Ronald R. Brooks and Det. Larry Gray of the Dover Police Department who being by me duly sworn depose and say:

That they have reason to believe and do believe that in the 222 S. Governors Avenue, Apartment # 3, Dover, Delaware. A two room apartment located on the south

side second floor of a white block building on the west side of S. Governors Avenue between Loockerman Street and North Street in the City of Dover. The ground floor of this building houses Wayman's Barber Shop the occupant of which is Jerome Franks there has been and/or there is now located and/or concealed certain property in said house, place, conveyance and/or on the person or persons of the occupants thereof, consisting of property, papers, articles, or things which are the instruments of criminal offense, and/or obtained in the commission of a crime, and/or designated to be used in the commission of a crime, and not reasonably calculated to be used for any other purpose and/or the possession of which is unlawful, papers, articles, or things which are of an evidentiary nature pertaining to the commission of a crime or crimes specified therein and in particular, a white knit thermal undershirt; a brown ¾ length leather jacket with a tie-belt; a pair of black mens pants; a dark colored knit hat; a long thin bladed knife or other instruments or items relating to the crime.

Articles, or things were, are, or will be possessed and/or used in violation of Title 11, Sub-Chapter D, Section 763, Delaware Code in that [see attached probable-cause page].

Wherefore, affiants pray that a search warrant may be issued authorizing a search of the aforesaid 222 S. Governors Avenue, Apartment # 3, Dover, Delaware. A two room apartment located on the south side second floor of a white block building on the west side of S. Governors Avenue ***174** between Loockerman St. and North Street, in the City of Dover in the manner provided by law.
/s/ Det. Ronald R. Brooks

/s/ Affiant

/s/ Det. Larry D. Gray

/s/ Affiant

SWORN to (or affirmed) and subscribed before me this 9th day of March A. D. 1976.
/s/ John [illegible] Green

/s/ Judge Ct 7

****2686** The facts tending to establish probable cause for the issuance of this search warrant are:
1. On Saturday, 2/28/76, Brenda L. B. _____, W/F/15, reported to the Dover Police Department that she had been kidnapped and raped.

2. An investigation of this complaint was conducted by Det. Boyce Failing of the Dover Police Department.

3. Investigation of the aforementioned complaint revealed that Brenda B. _____, while under the influence of drugs, was taken to 222 S. Governors Avenue, Apartment 3, Dover, Delaware.

4. Investigation of the aforementioned complaint revealed that 222 S. Governors Avenue, Apartment # 3, Dover, Delaware, is the residence of Jerome Franks, B/M DOB: 10/9/54.

5. Investigation of the aforementioned complaint revealed that on Saturday, 2/2[8]/76, Jerome Franks did have sexual contact with Brenda B. _____ without her consent.

6. On Thursday, 3/4/76 at the Dover Police Department, Brenda B. _____ revealed to Det. Boyce Failing that Jerome Franks was the person who committed the Sexual Assault against her.

7. On Friday, 3/5/76, Jerome Franks was placed under ***175** arrest by Cpl. Robert McClements of the Dover Police Department, and charged with Sexual Misconduct.

8. On 3/5/76 at Family Court in Dover, Delaware, Jerome Franks did, after being arrested on the charge of Sexual Misconduct, ma[k]e a statement to Cpl. Robert McClements, that he thought the charge was concerning Cynthia Bailey not Brenda B. _____.

9. On Friday, 3/5/76, Cynthia C. Bailey, W/F/21 of 132 North Street, Dover, Delaware, did report to Dover Police Department that she had been raped at her residence during the night.

10. Investigation conducted by your affiant on Friday, 3/5/76, revealed the perpetrator of the crime to be an unknown black male, approximately 5'7"', 150 lbs., dark complexion, wearing white thermal undershirt, black pants with a belt having a silver or gold buckle, a brown leather ¾ length coat with a tie belt in the front, and a dark knit cap pulled around the eyes.

11. Your affiant can state, that during the commission of this crime, Cynthia Bailey was forced at knife point and with the threat of death to engage in sexual intercourse with the perpetrator of the crime.

12. Your affiant can state that entry was gained to the residence of Cynthia Bailey through a window located on

the east side of the residence.

13. Your affiant can state that the residence of Jerome Franks is within a very short distance and direct sight of the residence of Cynthia Bailey.

14. Your affiant can state that the description given by Cynthia Bailey of the unknown black male does coincide with the description of Jerome Franks.

15. On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people.

***176** 16. On Tuesday, 3/9/76, Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket.

17. On Tuesday, 3/9/76, Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat.

18. Your affiant can state that a check of official records reveals that in ****2687** 1971 Jerome Franks was arrested for the crime of rape and subsequently convicted with Assault with intent to Rape.

APPENDIX B TO OPINION OF THE COURT

States permitting veracity challenges include:

Alabama:	McConnell v. State, 48 Ala.App. 523, 526-528,266 So.2d 328,330-333 (Crim. App.), cert. denied, 289 Ala. 746, 266 So.2d 334 (1972).
Alaska:	Davenport v. State. 515 P.2d 377, 380 (1973).
Arizona:	State v. Payne, 25 Ariz.App. 454, 456, 544 P.2d 671, 673 (1976); cf. State v. Pike, 113 Ariz. 511, 513-514,

	557 P.2d 1068, 1070-1071 (1976) (en banc).
Colorado:	People v. Arnold, 186 Colo. 372, 377-378, 527 P.2d 806, 809 (1974) (en banc).
Iowa:	State v. Boyd, 224 N.W.2d 609, 616 (1974) (en banc).
Louisiana:	State v. Melson, 284 So.2d 873, 874-875 (1973), limiting State v. Anselmo, 260 La. 306, 313-322, 256 So.2d 98, 101-104 (1971), cert. denied, 407 U.S. 911, 92 S.CT. 2438, 32 L.Ed.2d 685 (1972).

Massachusetts:	Commonwealth v. Reynolds, 374 Mass. 142, 149 151, 370 N.E.2d 1375, 1379-1380 (1977).
Minnesota:	State v. Luciow, 308 Minn. 6, 10-13, 240 N.W.2d 833, 837-838 (1976) (en banc).
Montana:	State v. Nanoff, 160 Mont. 344, 348, 502 P.2d 1138, 1140 (1972), sub silentio overruling State v. English, 71 Mont. 343, 350, 229 P. 727, 729, (1924).
New Hampshire:	State v. Spero, 117 N.H. 199, 204-205, 371 A.2d 1155, 1158 (1977)

	(based on State Constitution).
Pennsylvania:	Commonwealth v. Hall, 451 Pa. 201, 204, 302 A.2d 342, 344 (1973).
South Carolina:	State v. Sachs, 264 S.C. 541, 556,216 S.E.2d 501, 509 (1975).
Vermont:	State v. Dupaw, 134 Vt. 451, 452-453, 365 A.2d 967, 968 (1976).
Washington:	State v. Lehman, 8 Wash.App. 408, 414, 506 P.2d 1316, 1321 (1973) (Div. 3); State v. Goodlow, 11 Wash. App. 533, 535, 523 P.2d 1204, 1206 (1974) (Div. 1); cf. State v. Manly,

85 Wash.2d 120, 125, 530 P.2d 306, 309 (en banc), cert. denied, 423 U.S. 855, 96 S.Ct. 104, 46 L.Ed.2d 81 (1975).

*177 Five States, whose practice is dictated or may be dictated by statute, also permit veracity challenges:

California: Theodor v. Superior Court, 8 Cal.3d 77,90,100-101, 104 Cal.Rptr.226, 235, 243,501 P.2d 234, 243, 251 (1972)(en banc); see Cal.Penal Code Ann. §§ 1538.5, 1539, 1540 (West 1970 and Supp.1978).

New York: People v. Alfinito, 16 N.Y.2d 181, 185-186, 264 N.Y.S.2d 243, 245, 211 N.E.2d 644, 646 (1965); People v.

	Slaughter, 37 N.Y.2d 596, 600, 376 N.Y.S.2d 114, 116, 338 N.E.2d 622, 624 (1975); See N.Y.Code Crim.Proc. §§ 813-c, 813-d, 813-e (McKinney Supp. 1970-1971), superseded by N.Y.Crim. Proc. Law, Art. 710 (McKinney Supp. 1977-1978).
Oregon:	State v. Wright, 266 Or. 163, 168-169, n. 3, 511 P.2d 1223, 1225-1226, n. 3 (1973) (en banc); see Or.Rev.Stat. § 133.693 (1977).
Utah:	State V. Bankhead, 30 Utah 2d 135, 138, 514 P.2d 800, 802 (1973); see Utah Code Ann. §§ 77-54-17, 77-54-18 (1953).

*178 Two other States are more doubtful, but seem to allow veracity challenges:

Michigan: People v. Burt, 236 Mich. 62, 74, 210 N.W. 97, 101 (1926).

New Mexico: State V. Baca, 84 N.M. 513, 515, 505 P.2d 856, 858 (1973) (dictum).

The following States have disposed of particular veracity challenges on the ground the affidavits were in fact not false, or that any misstatements were immaterial or unintentional or were not by the affiant himself:

Florida: McDougall v. State, 316 So.2d 624, 625 (Dist.Ct.App.1975).

Georgia: Williams v. State, 232 Ga. 213, 213-214, 205 S.E.2d 859, 860 (1974); Lee v. State, 239 Ga. 769, 773-774, 238 S.E.2d 852, 856 (1977); Birge v.

	State, 143 Ga.App. 632, 633, 239 S.E. 2d 395, 397 (1977).
Indiana:	Moore v. State, 159 Ind.App. 381, 385-386, 307 N.E.2d 92, 94-95 (1974); Grzesiowski v. State, 168 Ind.App. 318, 328, 343 N.E.2d 305, 312 (1976); but see Seager v. State, 200 Ind. 579, 582, 164 N.E. 274, 275 (1928).
Ohio:	State v. Dodson, 43 Ohio App.2d 31, 35-36, 332 N.E.2d 371, 374-375 (1974).
Wisconsin:	Scott v. State, 73 Wis.2d 504, 511-512, 243 N.W.2d 215, 219 (1976).

Cf. Maine: State v. Koucoules, Me., 343 A.2d 860, 865 n. 3 (1974).

*179 **2688 Eleven States flatly prohibit veracity challenges:

Arkansas: Liberto v. State, 248 Ark. 350, 356-357, 451 S.W.2d 464, 468 (1970) (alternative holding); cf. Powell v. State, 260 Ark. 381, 383, 540 S.W.2d 1, 2 (1976).

Connecticut: State v. Williams, 169 Conn. 322, 327-329, 363 A.2d 72 76-77 (1975).

Illinois: People v. Bak, 45 Ill.2d 140, 144-146, 258 N.E.2d 341, 343-344, cert. denied, 400 U.S. 882, 91 S.Ct. 117, 27 L.Ed.2d 121 (1970); People v. Stansberry, 47 Ill.2d 541, 544, 268 N.E.2d 431, 433, cert. denied, 404 U.S. 873, 92 S.Ct. 121, 30 L.Ed.2d 116 (1971).

Kansas: State v. Lamb, 209 Kan. 453, 467-468, 497 P.2d 275,

	287 (1972); State v. Sanders, 222 Kan. 189, 194-196, 563 P.2d 461, 466-467 (alternative holding), cert. denied, 434 U.S. 833, 98 S.Ct. 648, 54 L.Ed.2d 499 (1977).
Kentucky:	Caslin v. Commonwealth, 491 S.W.2d 832, 834 (1973).
Maryland:	Smith v. State, 191 Md. 329, 334-336, 62 A.2d 287, 289-290 (1948), cert. denied, 336 U.S. 925, 69 S.Ct. 656, 93 L.Ed. 1087 (1949); Tucker v. State, 244 Md. 488, 499-500, 224 A.2d 111, 117-118 (1966), cert. denied, 386 U.S. 1024, 87 S.Ct. 1381, 18 L.Ed.2d 463 (1967); Dawson v. State, 11 Md.App. 694, 713-715, 276 A.2d 680, 690-691 (1971).
Mississippi:	Wood v. State, 322 So.2d 462, 465 (1975).
New Jersey:	State v. Petillo, 61 N.J. 165, 173-179, 293 A.2d 649, 653-656 (1972), cert. denied, 410 U.S. 945,

	93 S.Ct. 1393, 35 L.Ed.2d 611 (1973); but see 61 N.J., at 178 N. 1, 293 A.2d, at 656 n. 1.
Oklahoma:	Brown v. State, 565 P.2d 697 (Crim.App.1977), overruling McCaskey v. State, 534 P.2d 1309, 1311-1312 (Crim.App.1975), and Henderson v. State, 490 P.2d 786, 789 (Crim.App.1971), and reaffirming Gaddis v. State, 447 P.2d 42 (Crim.App.1968).
Tennessee:	Owens v. State, 217 Tenn. 544, 553, 399 S.W.2d 507, 511 (1965): Poole v. State, 4 Tenn.Cr.App. 41, 53-54, 467 S.W.2d 826, 832, cert. denied, ibid. (1971).
Texas:	Phenix v. State, 488 S.W.2d 759, 765 (Crim.App.1972); Oubre v. State, 542 S.W.2d 875, 877 (Crim.App.1976).

***180** Two States have prohibited challenges that were directed seemingly against the conclusory nature of the affidavits, rather than their veracity.

Missouri:	State v. Brugioni, 320 Mo. 202, 206, 7 S.W.2d 262,

263 (1928).

Rhode Island: State v. Seymour, 46 R.I. 257, 260, 126 A. 755, 756 (1924), partially overruled, State v. LeBlanc, 100 R.I 523, 528-529, 217 A.2d 471, 474 (1966); but see State v. Cofone, 112 R.I. 760, 766-767, 315 A.2d 752, 755-756 (1974).

Mr. Justice REHNQUIST, with whom The Chief Justice joins, dissenting.

The Court's opinion in this case carefully identifies the factors which militate against the result which it reaches, and emphasizes their weight in attempting to limit the circumstances ***181** under which an affidavit supporting a search warrant may be impeached. I am not ultimately persuaded, however, that the Court is correct as a matter of constitutional law that the impeachment of such an affidavit must be permitted under the circumstances described by the Court, and I am thoroughly persuaded that the barriers which the Court believes that it is erecting against misuse of the impeachment process are frail indeed.

I

The Court's reliance on *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), for the proposition that a determination by a neutral magistrate is a prerequisite to the sufficiency of an application for a warrant is obviously correct. In that case the Court said: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a ****2689** neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.,* at 13–14, 68 S.Ct., at 369.

The notion that there may be incorrect or even deliberately falsified information presented to a magistrate in the course of an effort to obtain a search warrant does not render the proceeding before a magistrate any different from any other factfinding procedure known to the law. The Court here says that "it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." *Ante,* at 2682. I do not believe that this flat statement survives careful analysis.

If the function of the warrant requirement is to obtain the determination of a neutral magistrate as to whether sufficient ***182** grounds have been urged to support the issuance of a warrant, that function is fulfilled at the time

the magistrate concludes that the requirement has been met. Like any other determination of a magistrate, of a court, or of countless other factfinding tribunals, the decision may be incorrect as a matter of law. Even if correct, some inaccurate or falsified information may have gone into the making of the determination. But unless we are to exalt as the *ne plus ultra* of our system of criminal justice the absolute correctness of every factual determination made along the tortuous route from the filing of the complaint or the issuanceof an indictment to the final determination that a judgment of conviction was properly obtained, we shall lose perspective as to the purposes of the system as well as of the warrant requirement of the Fourth and Fourteenth Amendments. Much of what Mr. Justice Harlan said in his separate opinion in *Mackey v. United States,* 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971), with respect to collateral relief from a criminal conviction is likewise applicable to collateral impeachment of a search warrant: "At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

***183** "A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. [Citation omitted.] This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Id.,* at 690–691, 91 S.Ct., at 1179.

****2690** I am quite confident that if our system of justice were not administered by judges who were once lawyers, it might well be less satisfactory than it now is. But I am equally confident that one improvement which would manifest itself as a result of such a change would be a willingness, reflected in almost all callings in our society except lawyers, to refrain from constant relitigation, whether in the form of collateral attack, appeal, retrial, or whatever, of issues that have originally been decided by a competent authority.

It would be extraordinary troubling in any system of criminal justice if a verdict or finding of guilt, later conclusively shown to be based on false testimony, were to result in the incarceration of the accused notwithstanding this fact. But the Court's reference to the "unthinkable imposition" of not allowing the impeachment of an affiant's testimony in support ***184** of a search warrant is a horse of quite another color. Particularly in view of the many hurdles which the prosecution must surmount to ultimately obtain and retain a finding of guilt in the light of the many constitutional safeguards which surround a criminal accused, it is essential to understand the role of a search warrant in the process which may lead to the conviction of such an accused. The warrant issued on impeachable testimony has, by hypothesis, turned up incriminating and admissible evidence to be considered by the jury at the trial. The fact that it was obtained by reason of an impeachable warrant bears not at all on the innocence or guilt of the accused. The only conceivable harm done by such evidence is to the accused's rights under the Fourth and Fourteenth Amendments, which have nothing to do with his guilt or innocence of the crime with which he is charged.

Given the definitive exposition of the warrant requirement quoted above from *Johnson v. United States,* 333 U.S., at 13–14, 68 S.Ct., at 369, it seems to me it would be quite reasonable for this Court, consistently with the Fourth and Fourteenth Amendments, to adopt any one of three positions with respect to the impeachability of a search warrant which had been in fact issued by a neutral magistrate who satisfied the requirements of *Shadwick v. Tampa,* 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972).

First, it could decide that the warrant requirement was satisfied when such a magistrate had been persuaded, and allow no further collateral attack on the warrant. In *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), the Court in reliance on *Giordenello v. United*

States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958), a case concededly decided pursuant to Fed.Rule Crim.Proc. 4, nonetheless held that the determination by a magistrate that the affidavit submitted to him made out "probable cause" for purposes of the Fourth and Fourteenth Amendments was subject to later judicial review as to the sufficiency of the affidavit. This rule was later reaffirmed in *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The Court has thus for more than a decade ***185** rejected the first possible stopping place in judicial re-examination of affidavits in support of warrants, and held that the legal determination as to probable cause was subject to collateral attack. While this conclusion does not seem to me to flow inexorably from the Fourth Amendment, I think that it makes a good deal of sense in light of the fact that a magistrate need not be a trained lawyer, see *Shadwick, supra,* and therefore may not be versed in the latest nuances of what is or what is not "probable cause" for purposes of the Fourth Amendment.

But to allow collateral examination of an affidavit in support of a warrant on a legal ground such as that is quite different from the rejection of the second possible stopping place as the Court does today. Magistrates need not be lawyers, but lawyers have no monopoly on determining whether or not an affiant who appears before them is or is not telling the truth. Indeed, a magistrate whose time may be principally spent in conducting preliminary hearings and trying petty offenses may have every bit as good a feel for the veracity of a particular witness as a judge of a court of general jurisdiction.

****2691** True, a warrant is issued *ex parte,* without an opportunity for the person whose effects are to be seized to impeach the testimony of the affiant. The proceeding leading to the issuance of a warrant is, therefore, obviously less reliable and less likely to be a searching inquiry into the truth of the affiant's statements than is a full-dress adversary proceeding. But it is at this point that I part company with the Court in its underlying assumption that somehow a full-dress adversary proceeding will virtually guarantee a truthful answer to the question of whether or not the affiant seeking the warrant falsified his testimony. A full-dress adversary proceeding is undoubtedly a better vehicle than an *ex parte* proceeding for arriving at the truth of any particular inquiry, but it is scarcely a guarantee of truth. Mr. Justice Jackson in his ***186** opinion concurring in the result in *Brown v. Allen,* 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), observed with respect to purely legal issues decided by this Court:

"However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Id.,* at 540, 73 S.Ct., at 427.

The same is surely true of a judge's review of the factual determinations of a magistrate; a larger percentage of the judge's findings as to the truth of an affiant's statement may be objectively correct than the percentage of the magistrate's determinations which are, but neither one is going to be 100 percent. Since once the warrant is issued and the search is made, the privacy interest protected by the Fourth and Fourteenth Amendments is breached, a subsequent determination that it was wrongfully breached cannot possibly restore the privacy interest. See *United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Since the evidence obtained pursuant to the warrant is by hypothesis relevant and admissible on the issue of guilt, the only purpose served by suppression of such evidence is deterrence of falsified testimony on the part of affiant in the future. Without attempting to summarize the many cases in which this Court has discussed the balance to be struck in such situations, see *United States v. Peltier,* 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), I simply do not think the game is worth the candle in this situation.

As the Court's opinion points out, the other jurisdictions which have considered this question are divided, although a majority of them favor the result reached by the Court today. The signed articles and student law review notes which the Court refers to in its opinion are not there, I trust, to be considered *en bloc* or by some process of counting without weighing. Presumably, to the extent that their reasoning ***187** commends itself to the courts which are committed to decide these questions, that reasoning will find its way into the opinions of those courts; to the extent that the reasoning does not so commend itself, the piece containing the reasoning does not weigh in the scales of decision simply because it appeared in a periodical devoted to the discussion of legal questions.

II

The Court has commendably, in my opinion, surrounded the right to impeach the affidavit relied upon to support the issuance of a warrant with numerous limitations. My fear, and I do not think it an unjustified one, is that these limitations will quickly be subverted in actual practice.

The Court states:
"Nor, if a sensible threshold showing is required and sensible substantive requirements for suppression are maintained, need there be any new large-scale commitment of judicial resources; many claims will wash out at an early stage, and the more substantial ones in any event would require judicial resources for vindication if the suggested alternative sanctions were truly to be effective. The **2692 requirement of a substantial preliminary showing should suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction." *Ante,* at 2684.

I greatly fear that this generalized language will afford insufficient protection against the natural tendency of ingenious lawyers charged with representing their client's cause to ceaselessly undermine the limitations which the Court has placed on impeachment of the affidavit offered in support of a search warrant. I am sure that the Court is sincere in its expressed hope that the doctrine which it adopts will not lead to "any new large-scale commitment of judicial resources," but in the end I am led once more to echo the *188 observation contained in another opinion of Mr. Justice Jackson:
"The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.' " *Everson v. Board of Education,* 330 U.S. 1, 19, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947) (dissenting opinion).

Since I would not "consent" even to the extent that the Court does in its opinion, I dissent from that opinion and would affirm the judgment of the Supreme Court of Delaware.

All Citations

438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The affidavit is reproduced as Appendix A to this opinion. *Post,* at 2685.

2 The references in paragraphs 15 and 16 of the warrant affidavit's probable-cause page to "James Williams" appear to have been intended as references to James D. Morrison, who was petitioner's supervisor at the Youth Center. Tr. 269. This misapprehension on the part of the State continued until shortly before trial. Eleven days prior to trial, the prosecution requested the Clerk of the Kent County Superior Court to summon "James Williams, Delaware Youth Center," for petitioner's trial. In his return on the summons, Record Doc. No. 16, the Kent County Sheriff stated that he "[s]erved the within summons upon . . . James Williams (Morrison)." The summons actually delivered was made out in the name of James Morrison.

3 It appears this is no longer the majority rule among the States. Compare Comment, 7 Seton Hall L.Rev. 827, 844 (1976) (about half of the States have addressed the issue, and the weight of authority is "slightly in favor" of permitting veracity challenges), with *North Carolina v. Wrenn,* 417 U.S. 973, 94 S.Ct. 3180, 41 L.Ed.2d 1144 (1974) (WHITE, J., dissenting from denial of certiorari) (majority of state decisions prohibit subsequent impeachment of an affidavit).
By our count, 19 States, and perhaps as many as 21, permit veracity challenges; 5 of these apparently rely on statutory provisions in so holding. Five States have disposed of particular veracity challenges on the ground there was no misstatement, or that any misstatement was immaterial or unintentional, without opining what would be done when there is a deliberate and material misrepresentation. There are now only 11 States that prohibit veracity challenges outright. Another two have barred impeachment challenges that seemed directed at the conclusory nature of affidavit allegations rather than at their veracity.
The case law is detailed in Appendix B. *Post,* at 2687.

4 This reasoning is misplaced. The Federal Courts of Appeals decisions allowing a defendant to challenge the veracity of a warrant affidavit rest on a constitutional footing. See *United States v. Belculfine,* 508 F.2d 58, 61, 63 (CA1 1974); *United States v. Dunnings,* 425 F.2d 836, 839–840 (CA2 1969), cert. denied, 397 U.S. 1002, 90 S.Ct. 1149, 25 L.Ed.2d 412 (1970); *United States v. Armocida,* 515 F.2d 29, 41 (CA3), cert. denied *sub nom. Gazal v. United States,* 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975); *United States v. Lee,* 540 F.2d 1205, 1208–1209 (CA4), cert. denied, 429 U.S. 894, 97 S.Ct. 255, 50 L.Ed.2d 177 (1976); *United States v. Thomas,* 489 F.2d 664, 668, 671 (CA5 1973), cert.

denied, 423 U.S. 844, 96 S.Ct. 79, 46 L.Ed.2d 64 (1975); *United States v. Luna*, 525 F.2d 4, 8 (CA6 1975), cert. denied, 424 U.S. 965, 96 S.Ct. 1459, 47 L.Ed.2d 732 (1976); *United States v. Carmichael*, 489 F.2d 983, 988–989 (CA7 1973) (en banc); *United States v. Marihart*, 492 F.2d 897, 898 (CA8), cert. denied, 419 U.S. 827, 95 S.Ct. 46, 42 L.Ed.2d 51 (1974); *United States v. Damitz*, 495 F.2d 50, 54–56 (CA9 1974); *United States v. Harwood*, 470 F.2d 322, 324–325 (CA10 1972).
Of all the Federal Courts of Appeals, only one now apparently refrains from permitting challenges to affidavit veracity. See *United States v. Watts*, 176 U.S.App.D.C. 314, 317–318 n. 5, 540 F.2d 1093, 1096–1097 n. 5 (1976); *United States v. Branch*, 178 U.S.App.D.C. 99, 102 n. 2, 545 F.2d 177, 180 n. 2 (1976).

5 Franks did not raise in his petition the issue of his *Miranda* challenge to the courthouse statement given to police and the use of that statement in the warrant affidavit. The propriety of the trial court's refusal to hear testimony on that subject is therefore not before us. It also appears that Franks did not take that issue to the Supreme Court of Delaware. See Opening Brief for Appellant, No. 259, 1976 (Del.Sup.Ct.).

6 The *Rugendorf* affidavit, sworn to by FBI Special Agent Moore, contained two alleged inaccuracies: a double hearsay statement that petitioner Samuel Rugendorf was the manager of Rugendorf Brothers Meat Market, and a double hearsay statement that he was associated with his brother, Leo, in the meat business. As to the second, the affidavit stated that a confidential informant told FBI Special Agent McCormick about the Rugendorf brothers' association, and McCormick told affiant Moore. As to the first, the affidavit stated that the information was given by Chicago Police Officer Kelleher to Special Agent McCormick, who in turn relayed it to affiant Moore. Kelleher testified that he did not so inform McCormick, but the petitioner in *Rugendorf* had failed to pursue the discrepancy: He did not seek a deposition from McCormick, who was in the hospital at the time of trial, and did not seek a postponement to enable McCormick to be present. 376 U.S., at 533 n. 4, 85 S.Ct., at 828. In characterizing the affidavit in *Rugendorf* as raising no question of integrity, the Court took as its premise that police could not insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity.

7 Mascolo, Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity, 44 Conn.Bar J. 9, 19, 25–28 (1970); Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv.L.Rev. 825, 830–832 (1971); Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury, 1971 U.Ill.Law Forum 405, 456; Forkosh, The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment, 34 Ohio St.L.J. 297, 306, 308, 340 (1973); Sevilla, The Exclusionary Rule and Police Perjury, 11 San Diego L.Rev. 839, 869 (1974); Herman, Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit, 36 Ohio St.L.J. 721, 738–739, 750 (1975); Note, 15 Buffalo L.Rev. 712, 716–717 (1966); Note, 51 Cornell L.Q. 822, 825–826 (1966); Note, 34 Ford.L.Rev. 740, 745 (1966); Note, 67 Colum.L.Rev. 1529, 1530–1531 (1967); Comment, 19 U.C.L.A. L.Rev. 96, 108, 146 (1971); Comment, 63 J.Crim.L., C.&P.S. 41, 48, 50 (1972); Note, 23 Drake L.Rev. 623, 638–639 (1974); Comment, 7 Seton Hall L.Rev. 827, 859–860 (1976).

8 Petitioner conceded that if what is left is sufficient to sustain probable cause, the inaccuracies are irrelevant. Tr. of Oral Arg. 3, 13. Petitioner also conceded that if the warrant affiant had no reason to believe the information was false, there was no violation of the Fourth Amendment. *Id.,* at 16–17.

141 So.3d 1281
District Court of Appeal of Florida,
Second District.

Blake Mitchell SANCHEZ, Appellant,
v.
STATE of Florida, Appellee.

No. 2D13–114.
|
July 23, 2014.

Synopsis

Background: Defendant was convicted in the Circuit Court, Polk County, Roger A. Alcott, J., of possession of methamphetamine and possession of drug paraphernalia. Defendant appealed the denial of his motion to suppress.

Holdings: The District Court of Appeal, Silberman, J., held that:

search warrant affidavit was insufficient to establish probable cause to search defendant's residence, and

good faith exception to the exclusionary rule did not apply.

Reversed and remanded.

Black, J., filed dissenting opinion.

Attorneys and Law Firms

***1282** Keith A. Peterson of Law Offices of Peterson, P.A., Mulberry, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jonathan P. Hurley, Assistant Attorney General, Tampa, for Appellee.

Opinion

SILBERMAN, Judge.

At issue in this prosecution for possession of methamphetamine and possession of drug paraphernalia is whether probable cause existed to support issuance of a search warrant on Blake Mitchell Sanchez's residence. Sanchez appeals his judgment and sentence for those crimes and contends that the trial court erred in denying his motion to suppress because the affidavit was insufficient to establish probable cause to issue the search warrant and that the good faith exception is inapplicable. Notably, at the suppression hearing, defense counsel asked the detective who prepared the affidavit the following: "What did you corroborate to put a connection, a nexus, between a tip and actually drug sales going on at the location?" The detective responded, "Nothing." Our review of the record supports the detective's candid admission, and we agree with Sanchez that probable cause was lacking and that the good faith exception does not apply. Therefore, we reverse his judgment and sentence and remand for further proceedings.

On September 6, 2011, Detective Gaskin submitted a sworn application for search warrant. The affidavit detailed Detective Gaskin's experience regarding narcotics investigations and stated that he had received an anonymous tip through Crime Stoppers on August 24, 2011. The tip stated that a white female was selling methamphetamine from a particular residence in Winter Haven. The tip provided a vehicle description that included a license plate number. The license plate was registered to Tara Hilliard Sanchez, a white female. The detective observed the vehicle parked in the driveway of the residence on August 26, 2011.

***1283** Detective Gaskin discovered that Tara Hilliard Sanchez and Blake Sanchez listed the address of that residence as their residence on their Florida identification cards. Criminal history checks revealed that Ms. Sanchez had arrests for possession of drug paraphernalia in 2003 and for trafficking in methamphetamine in 2000, as well as other narcotics charges. Sanchez had an extensive record, and the affidavit specifically mentioned narcotics charges in April 2010, theft charges in January 2010, resisting charges in March 2009, and counterfeiting charges in 2007. Detective Gaskin's investigation also revealed that search warrants had been served on the residence in 2003 and 2006. The 2003 search revealed ten grams of methamphetamine packaged in baggies and drug paraphernalia. The 2006 search revealed drug paraphernalia, including a scale that tested positive for methamphetamine.

The affidavit described an interview that Detective Leonard conducted on March 28, 2011, with a female who had been arrested. The female stated that Tara Sanchez was distributing methamphetamine from her

residence and described the area of the residence. The female believed that Ms. Sanchez was capable of selling ounces of methamphetamine. However, the female stated that she had never personally purchased methamphetamine from Ms. Sanchez but knew people who had.

As the result of a records search, Detective Gaskin discovered an incident that took place on July 18, 2011. Detective Esteve saw a vehicle parked in front of the Sanchez residence. He later conducted a traffic stop of the vehicle and arrested the driver. It was noted that all three occupants of the vehicle had criminal histories that included drug offenses. The driver, Stephanie Wells, was arrested for possession of methamphetamine and drug paraphernalia. Wells stated that she had been at the residence to sell digital cameras to Tara Sanchez who often purchased electronics.

The affidavit also related that Detective Gaskin conducted surveillance on the residence on August 26, 2011. On that date he observed a white male that appeared to be Sanchez standing in the front yard. Detective Gaskin observed a purple PT Cruiser pull into the driveway. The vehicle remained in the driveway for just over two minutes and left. Detective Gaskin did not see anyone from the residence make contact with anyone in the vehicle. The PT Cruiser traveled half a block east and stopped to pick up a white male who got in the front passenger seat. Law enforcement followed the vehicle and eventually stopped it for a traffic violation. The front seat passenger was arrested for possession of methamphetamine and drug paraphernalia. The driver was released.

A criminal history check showed that the driver of the PT Cruiser had an extensive criminal history that included marijuana charges in 2010 and 2011. The passenger had arrests only for criminal traffic violations.

The affidavit then stated the above information "constitutes an ongoing pattern of criminal activity that is continuous and has been for a period of time." The affiant believed, based on these facts and his training and experience, that Tara and Blake Sanchez and "other unknown subject(s) are actively utilizing the place to [be] searched for the distribution of illegal narcotics and that evidence proving this will be located at the place to be searched as a result of this search warrant."

The magistrate authorized the warrant on September 6, 2011, and law enforcement executed the warrant on September 7, 2011. The search revealed methamphetamine and drug paraphernalia in the residence. Sanchez filed a motion to suppress ***1284** evidence, and the trial court conducted a hearing on the motion at which Detective Gaskin testified.

During his testimony, Detective Gaskin clarified the facts regarding the incident on July 18, 2011, in which Detective Esteve observed a vehicle parked at the residence. When Detective Esteve subsequently stopped the driver, Stephanie Wells, for a traffic violation and possession of methamphetamine, Wells admitted that the drugs in her possession were from her usage the prior evening. The affidavit made no mention of the fact that Wells stated that the drug usage was from the prior evening. In addition, the affidavit provides that Wells said she was at the residence to sell digital cameras to Tara Sanchez. Detective Gaskin testified at the suppression hearing that Detective Esteve actually found cameras on Wells' person; this fact was not in the affidavit. Detective Gaskin also acknowledged at the suppression hearing that Wells was arrested for a residual amount of methamphetamine. The fact that the arrest was for a residual amount was not contained in the affidavit.

Detective Gaskin also testified that he did a lot of rolling surveillance (drive-bys) and some stationary surveillance of the residence. He observed no hand-to-hand sales and no high traffic patterns commonly associated with drug sales. He had been unable to conduct any trash pulls at the residence and did not use a confidential informant as part of the investigation. He also admitted that the anonymous tip contained some details that were incorrect. Defense counsel asked, "What did you corroborate to put a connection, a nexus, between a tip and actually drug sales going on at the location?" The detective responded, "Nothing."

The detective relied on the drug histories and search warrants executed in 2003 and 2006, the female that spoke with Detective Leonard in March 2011, the arrest of Wells who had methamphetamine (of a residual amount) in her vehicle in July 2011, and his observation of the PT Cruiser in the driveway and subsequent arrest of the passenger. Detective Gaskin admitted that he believed there was a pattern of criminal activity based on historical facts and "[n]othing current" except the PT Cruiser stop.

In denying the motion to suppress, the trial court found that the application for search warrant set forth probable cause and that there was "no evidence that the affiant acted in willful disregard of the truth." The trial court went on to state that the officer was acting in good faith when he executed the warrant and that "the anonymous tip was supported by further investigation that disclosed the persons residing in the house had an on-going history

of drug law violations and the house was frequented by drug users." The court concluded that the police "were acting with a warrant supported by facts and circumstances."

On the appeal of a ruling regarding probable cause to support a search warrant, our "review consists of 'a legal examination of the evidence in the affidavit to determine whether it establishes probable cause—with a presumption of correctness given to the trial court, which in turn gave great deference to the magistrate.' " *Barrentine v. State,* 107 So.3d 483, 484 (Fla. 2d DCA 2013) (quoting *Pilieci v. State,* 991 So.2d 883, 894 (Fla. 2d DCA 2008)). To establish probable cause, a supporting affidavit for issuance of a search warrant "must satisfy two elements: first, that a particular person has committed a crime—the commission element, and second, that evidence relevant to the probable criminality is likely located at the place to be searched—the nexus ***1285** element." *Burnett v. State,* 848 So.2d 1170, 1173 (Fla. 2d DCA 2003); *see also State v. McGill,* 125 So.3d 343, 348 (Fla. 5th DCA 2013). "To satisfy the nexus element, the affidavit must establish the particular time when the illegal activity that is the subject of the warrant was observed." *McGill,* 125 So.3d at 348.

The exact time of the illegal activity need not be stated expressly in the affidavit; if the magistrate can determine the relevant time period from the affidavit as a whole, it is sufficient. *Barrentine,* 107 So.3d at 485. The time of the illegal activity is important because as the time between the illegal activity and the issuance of the warrant increases, it becomes less likely that the evidence to be seized will be found. *Id.; see also McGill,* 125 So.3d at 349 (recognizing that information concerning consumable items like narcotics may become stale sooner than for nonconsumable items like videotapes). In *Barrentine,* this court determined that neighbors' reports of animal cruelty and fighting "from three years previous were obviously too remote in time to establish probable cause." 107 So.3d at 485.

Here, an anonymous tip received on August 24, 2011, asserted that a white female was selling methamphetamine from the residence at issue. The tip gave no details regarding when sales had been made and did not state that the tipster had observed any drugs in the residence. The affidavit shows no nexus between the tip and actual drug sales at the residence. Detective Gaskin admitted at the hearing that he had "nothing current" as a nexus to connect the anonymous tip and drug sales going on at the residence, except the stop of the PT Cruiser.

But the PT Cruiser stop did not show that a drug sale had taken place at the residence when the PT Cruiser was briefly parked in the driveway on August 26, 2011. Detective Gaskin did not see any interaction between any occupant of the PT Cruiser and anyone at the residence. The detective saw no conversation or hand-to-hand exchange. After the PT Cruiser left the residence, the driver stopped down the street and a man got in the front passenger seat. This passenger was later arrested for methamphetamine possession, but nothing connected him to the residence. The driver was not arrested.

An earlier event on July 18, 2011, also did not connect drugs to the residence. Wells' vehicle had been parked in front of the residence. Detective Esteve later conducted a traffic stop and arrested her for possession of methamphetamine, but she told the officer she was at the residence to sell cameras to Tara Sanchez. At the suppression hearing, Detective Gaskin admitted that Wells told the officer the drugs were from her previous evening's usage and admitted that Wells was in possession of only a residual amount of methamphetamine. Thus, it does not appear that Wells had just engaged in a drug transaction when she was at the residence.

The trial court found in its order denying suppression that "the anonymous tip was supported by further investigation that disclosed the persons residing in the house had an on-going history of drug law violations and the house was frequented by drug users." This does nothing to corroborate that drugs sales were currently occurring at the residence and that drugs would likely be found at the residence. Although the criminal history of a suspect can be a factor when determining whether probable cause exists, *see State v. Gross,* 833 So.2d 777, 780 (Fla. 3d DCA 2002), it does not show current drug sales were taking place at the residence when there was otherwise no such evidence. *Cf. McGill,* 125 So.3d at 350 (stating that the ***1286** defendant's history of drug-related offenses provided additional support for the search warrant). And even the tip here failed to state when any drug sales had occurred.

In contrast to the present case, in *Gross* the police conducted a trash pull at the residence that revealed drugs and paraphernalia commonly used for the sale of drugs. 833 So.2d at 780. In addition to the defendant's prior criminal history of drug sales several months prior, the evidence from the trash pull corroborated the tip that drug sales were being made at the residence. *Id.*

Detective Gaskin relied upon prior drug histories that showed Sanchez's most recent arrest on narcotics charges to be in April 2010 and Tara Sanchez's most recent drug

related arrest to be in 2003. The detective also relied on two prior searches of the residence, one that occurred in 2006 and one that occurred in 2003—more than five years and eight years, respectively, before the anonymous tip was received and the warrant issued. The trial court relied on this criminal history to corroborate the anonymous tip.

But nothing in the investigation showed that evidence of current drug sales was likely to be found in the residence. Detective Gaskin had no evidence of a drug sale taking place at the residence within a reasonable time prior to the issuance of the warrant. *See Pilieci,* 991 So.2d at 891 (explaining that thirty days is a "rule of thumb" to determine staleness but that each case must be determined on its own circumstances). Although the detective relied on the incident of the purple PT Cruiser parked in the driveway, the passenger later arrested was never seen at the residence and no actual sale or hand-to-hand transaction was ever observed at the residence.

Based on the totality of the circumstances, the affidavit did not establish a fair probability that evidence of methamphetamine sales would be found at the residence when the warrant was signed on September 6, 2011. *See Barrentine,* 107 So.3d at 484; *see also Pilieci,* 991 So.2d at 894 ("At best, the affidavit establishes a slight possibility and not a 'fair probability' of finding drugs almost a month after a single sale transaction."); *Gonzalez v. State,* 38 So.3d 226, 229–230 (Fla. 2d DCA 2010) ("The affidavit contained no allegations that anyone actually saw contraband in the couple's residence and there were no facts from which the magistrate could conclude that contraband was and would still be located in the residence at the time the warrant issued.").

The State argues that the record supports the trial court's finding that Detective Gaskin was acting in good faith and that it is appropriate to apply the good faith exception set forth in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The trial court stated in its order that Detective Gaskin was acting in good faith, but the trial court did not address the omissions in the affidavit, particularly regarding the July 2011 incident in which Wells was found in possession of methamphetamine after having visited the residence. The affidavit failed to reflect that Wells told the officer the methamphetamine was from her use the prior evening and that it was a residual amount.

However, even without considering these omissions from the affidavit, the affidavit shows no nexus between the object of the search—evidence of the sale of methamphetamine—and the residence. *See Garcia v. State,* 872 So.2d 326, 330 (Fla. 2d DCA 2004) (stating that the affidavit failed to establish a nexus between cocaine and the residence and that "[e]ven if we overlook the omissions and errors within the ***1287** affidavit, the determination that cocaine was located within the residence was necessarily based on speculation, rather than a fair probability"). A significant focus of the affidavit here was on old criminal history, and nothing showed an actual drug sale at the residence to corroborate the anonymous tip that did not specify a time frame. Thus, we conclude that "an objectively reasonable officer would have known that the affidavit was insufficient to establish probable cause for the search." *Gonzalez,* 38 So.3d at 230. Therefore, the good faith exception is inapplicable. *Id.; see also Mesa v. State,* 77 So.3d 218, 223 (Fla. 4th DCA 2011) (stating that *Garcia,* 872 So.2d at 330, "held that, where there is a lack of facts, a real paucity of facts, a very weak case, the law is well established that where 'the supporting affidavit fails to establish probable cause to justify a search, Florida courts refuse to apply the good faith exception' ").

Finally, we address the dissent's observations. While the dissent correctly acknowledges that the issue of probable cause turns on the facts stated in the affidavit, the dissent emphasizes Sanchez's criminal history and three additional incidents. But the dissent ignores the staleness of the historical information and, perhaps more importantly, the lack of a connection between the incidents and the likelihood that evidence of drug sales might be found at the residence at the time of execution of the search warrant.

The first incident, the interview with a female in March 2011, over five months before the warrant was obtained, provides no clue as to when unidentified "people" had purchased drugs from the residence. The second incident, nearly two months before the warrant was obtained, involved a traffic stop of a vehicle that had been at the residence. Nothing in the affidavit connected the residence and the drugs that were found on the driver. Later testimony established that the drugs were only a residual amount rather than anything purchased at the residence. The third incident, involving the PT Cruiser, did not establish contact between anyone in the residence and any occupant of the vehicle. In fact, the passenger who was in the vehicle and found to have drugs was picked up after the vehicle left the residence. Nothing connected him with the residence or a drug sale at the residence.

The dissent suggests that this "smoke" was sufficient to establish probable cause. But even if the proverbial smoke suggested a fire is burning somewhere, it simply did not establish what is critical to the requisite legal analysis: did

the affidavit establish a fair probability that execution of the warrant would result in the discovery of evidence of drug sales at the residence? Speculation and a mere possibility based on "smoke" do not substitute for concrete facts that would establish probable cause for the search of the residence.

Accordingly, the trial court should have granted the motion to suppress, and we reverse Sanchez's judgment and sentence and remand for further proceedings.

Reversed and remanded.

WALLACE, J., Concurs.

BLACK, J., Dissents with opinion.

BLACK, Judge, Dissenting.

I respectfully dissent. The majority opinion relies heavily on Detective Gaskin's testimony from the suppression hearing conducted in July 2012, some ten months after he submitted his sworn application for search warrant which was granted by Polk County Circuit Judge Dale Durrance. Detective Gaskin's uneven testimony at the hearing is not reflective of the sufficiency of the affidavit placed before the judge nearly a year earlier, and it ***1288** is the sufficiency of the affidavit which is key to the probable cause determination. *See State v. Loredo,* 129 So.3d 1188, 1191–92 (Fla. 2d DCA 2014); *State v. Exantus,* 59 So.3d 359, 361–62 (Fla. 2d DCA 2011); *Pilieci v. State,* 991 So.2d 883, 892 (Fla. 2d DCA 2008).

In determining whether probable cause existed the issuing judge was to consider only the facts stated in the affidavit. *Pilieci,* 991 So.2d at 889. Clearly, the judge could not consider unknown information or omissions, and this is not a case involving omissions which would have defeated probable cause where such omissions " 'resulted from intentional or reckless police conduct that amount[ed] to deception.' " *Id.* at 893 (quoting *Johnson v. State,* 660 So.2d 648, 656 (Fla.1995)). Further, " '[o]n a motion to suppress the fruits of a search in accordance with a warrant, a trial court examines whether the issuing [judge] had a substantial basis for concluding that probable cause existed, and this determination is made by examining the affidavit in its entirety.' " *Id.* at 892 (quoting *State v. Vanderhors,* 927 So.2d 1011, 1013 (Fla. 2d DCA 2006)). Concentrating on the affidavit's four corners leads to the all but inescapable conclusions that probable cause existed for yet another search of the subject premises and a fair probability that said search would result in yet another seizure of illicit narcotics.

The affidavit at issue revealed that Blake Sanchez was the subject of more than forty prior charges, the most recent being for narcotics in April 2010. Further, the affidavit noted that Sanchez was arrested in both 2003 and 2006 following the execution of search warrants on the same residence at issue in this case. In 2003, 2.8 grams of methamphetamine and numerous pieces of drug paraphernalia were found in Sanchez's bedroom. In 2006, a scale testing positive for methamphetamine was found, resulting in charges being filed against him.

Although the majority opinion fairly recounts the anonymous tip that began the latest investigation at 2020 9th Street NW, much of the remainder of the opinion is devoted to attempting to explain away the heavy "smoke"—the probable cause—further supported by three corroborating incidents recounted in detail in the affidavit.

The first of these was an interview conducted on March 28, 2011, with a female who, following her arrest, stated that Tara Sanchez was distributing methamphetamine from her residence. The majority's criticism is that this female had not personally purchased the drugs but only "knew people who had." However she came to know that information, it was part of the allegations and circumstances of the affidavit.

The second corroborating incident was the arrest of Stephanie Wells in July 2011. She was found in possession of a residual amount of methamphetamine. The affidavit points out that Ms. Wells has a criminal history dating back to 1998, including multiple arrests for possession of drug paraphernalia, possession of marijuana, and possession of methamphetamine charges for felony criminal mischief; as well as charges for resisting arrest without violence, passing worthless checks, filing a false police report, and domestic violence. The majority opinion discounts Ms. Wells' arrest because she had only a "residual" amount of methamphetamine and because she claimed to be merely trying to sell cameras at the subject residence and was not there to purchase drugs.

The third corroborating incident was the observation and subsequent stop of the PT Cruiser in August 2011. Although a passenger in the PT Cruiser was found in possession of methamphetamine, the majority dismisses this arrest because the ***1289** officer did not actually witness a drug transaction taking place at the subject

premises from which the vehicle had recently departed and because the drugs were found on the passenger and not the driver.

Each of the aforementioned incidents occurred in 2011, within months of the search in question. Taken alone, the corroborating incidents might possibly be discounted. However, the issuing judge must make a common-sense decision whether given the circumstances set forth in the affidavit—and only those circumstances—there is a fair probability that evidence of a crime will be found in a particular place. *Willacy v. State,* 967 So.2d 131, 147 (Fla.2007); *Pilieci,* 991 So.2d at 889 (quoting *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)); *accord Williams v. State,* 130 So.3d 757, 760 (Fla. 2d DCA 2014). By focusing on the suppression hearing and what was left out of the affidavit, I believe the majority opinion incorrectly discounts all that was in the affidavit—the only information the issuing judge had to consider.

"[T]he appellate court needs to be entirely persuaded that both the trial court and the magistrate made an error when applying the law in deciding that the content of the affidavit established probable cause to search the [property]." *Pilieci,* 991 So.2d at 894. I am not persuaded. Consider what the issuing judge had before him in making the probable cause determination:

First, he knew that the same premises, occupied by the same people, had been searched twice previously, with each search resulting in narcotics charges. Second, he knew of the more than forty prior charges levied against Blake Sanchez, the most recent of which was in 2010. Third, he knew of the anonymous tip, which included an accurate license plate number. Fourth, he knew of three corroborating drug-related incidents involving the premises, all of which occurred in the months leading up to Detective Gaskin's request for a warrant.

Given this information, Judge Durrance would have been remiss in not finding sufficient probable cause to issue a search warrant. I would affirm the circuit court's denial of the motion to suppress.

All Citations

141 So.3d 1281, 39 Fla. L. Weekly D1514

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