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## Criminal Law - Search and Seizure - Probable Cause Standard and the Informant - *Spinelli v. United States*, 89 S. Ct. 584 (1969).

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**Criminal Law—SEARCH AND SEIZURE—PROBABLE CAUSE STANDARD AND THE INFORMANT.** *Spinelli v. United States*, 89 S. Ct. 584 (1969).

An agent for the Federal Bureau of Investigation, in support of an application for a search warrant, submitted an affidavit reciting that: (1) the FBI had been "informed by a confidential reliable informant" that Spinelli was conducting gambling operations by the means of two specified telephones; (2) an FBI investigation had shown the suspect to be a "known" bookmaker; and, (3) Spinelli had been seen by the agent on numerous occasions entering and leaving the apartment in which the specified phones were located.<sup>1</sup> The warrant was issued upon these grounds, and Spinelli was subsequently convicted of interstate travel in aid of racketeering.<sup>2</sup>

The Court of Appeals for the Eighth Circuit affirmed the conviction;<sup>3</sup> the Supreme Court, after granting certiorari,<sup>4</sup> limited their review to the question of the constitutional validity of the warrant.<sup>5</sup> The Court reversed, holding that the affidavit did not furnish probable cause.

Under the provision of the fourth amendment that no warrant shall be issued without probable cause,<sup>6</sup> it has been held that it is the magistrate's role to survey the facts presented to him and determine if the requirements of the amendment are met.<sup>7</sup> To do this a standard must be established from which he can gauge certain factors and render his decision accordingly.<sup>8</sup> The magistrate has become interposed between the police and the citizenry in the determination of probable cause.<sup>9</sup>

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

2. Spinelli was convicted under 18 U.S.C. § 1952 (1964).

3. 382 F.2d 871 (8th Cir. 1967).

4. 390 U.S. 942 (1968).

5. 391 U.S. 933 (1968).

6. U.S. Const. amend. IV:

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

7. *Aguilar v. Texas*, 378 U.S. 108 (1964); see, e.g., *United States ex rel. DeNegris v. Mengor*, 360 F.2d 190 (2d Cir. 1966); *United States v. Ramirez*, 279 F.2d 712 (2d Cir. 1959).

8. *Giordenello v. United States*, 357 U.S. 480 (1958); see *Commonwealth v. Penta*, 225 N.E.2d 58 (Mass. 1967); LaFave and Remington, *Controlling the Police: The Judge's Role in Making & Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965). LaFave and Remington conclude:

Judicial participation in law enforcement decisions is not very meaningful in practice. The judicial officer is usually not consulted in advance, and, when he is, his participation is largely perfunctory. . . . Even when

Hearsay information has been deemed sufficient as a source for probable cause where a "substantial basis" for crediting its validity is presented.<sup>10</sup> This has been true in warrant and non-warrant cases.<sup>11</sup> In the normal case, law enforcement officials have attempted to predicate probable cause on an informant's tip.<sup>12</sup> The courts then have been presented with a conflict between the protection of the "informer's privilege"<sup>13</sup> and the accused's fourth amendment rights.<sup>14</sup> From this context, two lines of cases have developed concerning the informant and probable cause.

In *Aguilar v. Texas*,<sup>15</sup> the Supreme Court established a two-point probable cause standard in dealing with an affidavit resting upon "reliable information from a credible person."<sup>16</sup> The Court held that an

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a warrant is obtained, the objective of the police usually is not to acquire a judicial evaluation of the grounds for arrest; rather, the warrant is sought as a booking device or to serve some other administrative function. *Id.* at 992.

9. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Jones v. United States*, 362 U.S. 257 (1960). See generally, Miller and Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U.L.Q. 1. The study suggested that often the documents were signed without a detailed reading of the contents, but that the decisions were not ones of a "detached" magistrate.

10. *Jones v. United States*, 362 U.S. 257 (1960). See, e.g., *United States v. Freeman*, 358 F.2d 459 (2d Cir. 1966).

11. Compare *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Rudendorf v. United States*, 376 U.S. 528 (1964), with *McCray v. Illinois*, 386 U.S. 300 (1967) and *Draper v. United States*, 358 U.S. 307 (1959).

12. One of the first definitions was set down in *Brinegar v. United States*, 338 U.S. 160, at 175-76 (1949)

Probable cause exists where "the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

13. The informer's privilege is the prosecution's evidentiary privilege of withholding the informer's identity, but its effect is also to grant the informer the privilege of having his anonymity preserved, and it is for this reason that the informer is willing to come forward to supply information. A more definitive statement concerning the informer, as required by the Court in *Aguilar*, goes far to destroy the usefulness of this privilege.

14. The "informer's privilege" was first protected in *Roviaro v. United States*, 353 U.S. 53 (1957). See generally, Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Comment, *Warrantless Arrest and Search on the Basis of Informer's Communication*, 42 ST. JOHN'S L. REV. 270 (1967).

15. 378 U.S. 108 (1964).

16. See generally, Nedrud, *An Outline of Arrest, Search & Seizure*, 5 TULSA L. REV. 154 (1968); Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts*, 53 CALIF. L. REV. 840 (1965).

affidavit might properly rely on hearsay information so long as the magistrate is informed of "some of the underlying circumstances" both (1) from which the informant reached his conclusion, and (2) from which the affiant concluded the informant was reliable or credible.

In subsequent cases, the lower courts failed to give emphasis to the second point of this standard. Instead, conclusory recitals of reliability were deemed sufficient in meeting this test.<sup>17</sup> The Supreme Court reinforced that practice by warning against viewing warrant requirements too "hypertechnically," and by stressing a "common sense" application of *Aguilar's* standard.<sup>18</sup>

*Aguilar* did not encompass the approach taken by the Court in *Draper v. United States*,<sup>19</sup> which held that knowledge gained from an informer and corroborated by innocent facts in themselves could support an arrest without a warrant. A greater emphasis was placed on prior reliability as opposed to *Aguilar's* "substantial basis" of accreditation of the tip's validity and source.<sup>20</sup> *Draper* emphasized as its standard, the totality of circumstances, including personal observations, informant's tips, and other factors.<sup>21</sup> In contrast to *Draper*, *Aguilar* focused on the probative value of the information given to the affiant as the gauge by which the magistrate should draw his conclusion.

In *Spinelli*, the Supreme Court placed emphasis on a strict application of *Aguilar* as the proper standard of probable cause, and in doing so, the Court rejected *Draper's* "totality of circumstances" approach.<sup>22</sup> By *Draper* standards, the independent information may very well have

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17. See, e.g., *United States v. Roth*, 391 F.2d 507 (7th Cir. 1967); *Smith v. United States*, 358 F.2d 833 (D.C. Cir. 1966); *United States v. Freeman*, 358 F.2d 459 (2d Cir. 1966).

18. *United States v. Ventresca*, 380 U.S. 102 (1965); see Comment, *supra* note 14.

19. 358 U.S. 307 (1959). The information given by the informant in *Draper* included the accused's supposed sale of narcotics, his attire, his speed in walking, that he carried a tan bag, and that he could be found at a designated time at a Denver railroad station.

Given a reliable informer, as in *Draper*, verification of such innocent details, although not directly suggestive of guilt, probably does perform a legitimate function. It reduces the possibility that the reliable informer's information in a particular instance, although given in good faith, is inaccurate. Where there is no pre-established reputation for reliability, the value of innocent corroboration, without more, is questionable. Comment, *supra* note 16, at 843.

20. See, e.g., *Smith v. United States*, 358 F.2d 833 (D.C. Cir. 1966); *United States v. Freeman*, 358 F.2d 459 (2d Cir. 1966).

21. See Comment, *The Effect of the Fourth Amendment on Arrests Without a Warrant*, 26 LA. L. REV. 789 (1966).

22. 89 S. Ct. 584 (1969).

given the "suspicious" color needed to support the tip,<sup>23</sup> but *Spinelli* precludes the further application of *Draper* in cases inconsistent with *Aguilar*. Although not expressly overruling *Draper*,<sup>24</sup> the Court feels it is the test of *Aguilar* which the magistrate should use in ruling on questions of probable cause.

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23. *Id.* at 592-95 (J. White concurring).

24. The Court in *Spinelli* concludes:

In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck v. Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois*, 386 U.S. 300, 311, 87 S.Ct. 1056, 1062 (1967); that in judging probable cause issuing magistrates are not to be confined by rigidly limitations or by restrictions on the use of their common sense, *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 745 (1964); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States*, 362 U.S. 257 270-71, 80 S.Ct. 725, 735-36 (1960). *Id.* at 590-91.