
Ray C. Stoner

Repository Citation

Copyright © 1969 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository. https://scholarship.law.wm.edu/wmlr

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. The warrant was issued upon these grounds, and Spinelli was subsequently convicted of interstate travel in aid of racketeering.

The Court of Appeals for the Eighth Circuit affirmed the conviction; the Supreme Court, after granting certiorari, limited their review to the question of the constitutional validity of the warrant. 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, 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. To do this a standard must be established from which he can gauge certain factors and render his decision accordingly. The magistrate has become interposed between the police and the citizenry in the determination of probable cause.

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


   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. This has been true in warrant and non-warrant cases. In the normal case, law enforcement officials have attempted to predicate probable cause on an informant's tip. The courts then have been presented with a conflict between the protection of the "informer's privilege" and the accused's fourth amendment rights. From this context, two lines of cases have developed concerning the informant and probable cause.

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


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.


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.17 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.18

Aguilar did not encompass the approach taken by the Court in Draper v. United States,19 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.20 Draper emphasized as its standard, the totality of circumstances, including personal observations, informant's tips, and other factors.21 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.22 By Draper standards, the independent information may very well have

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).


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.

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).


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

\textbf{RAY C. STONER}

\textsuperscript{23} \textit{Id.} at 592-95 (J. White concurring).

\textsuperscript{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 nigardly 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). \textit{Id.} at 590-91.