Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

CI's & Search Warrants

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84 S.Ct. 1509
Supreme Court of the United States

Nick Alford AGUILAR, Petitioner,

v.

STATE OF TEXAS.

No. 548.
|
Argued March 25, 26, 1964.
|
Decided June 15, 1964.

Synopsis

Defendant was convicted, in the Criminal District Court, Harris County, Texas, of illegal possession of heroin, and the Texas Court of Criminal Appeals, 172 Tex.Cr.R. 629, 362 S.W.2d 111, affirmed. On certiorari granted, the United States Supreme Court, Mr. Justice Goldberg, held that affidavit for search warrant may be based on hearsay information and need not reflect direct personal observations of affiant but magistrate must be informed of some of underlying circumstances on which informant based his conclusions and some of underlying circumstances from which officer concluded that informant, whose identity need not be disclosed, was 'credible' or that his information was reliable.

Reversed and remanded.

Mr. Justice Clark, Mr. Justice Black and Mr. Justice Stewart, dissented.

Attorneys and Law Firms

****1511** ***108** Clyde W. Woody, Houston, Tex., for petitioner.

Carl E. F. Dally, Houston, Tex., for respondent.

Opinion

***109** Mr. Justice GOLDBERG delivered the opinion of the Court.

This case presents questions concerning the constitutional requirements for obtaining a state search warrant.

Two Houston police officers applied to a local Justice of the Peace for a warrant to search for narcotics in petitioner's home. In support of their application, the officers submitted an affidavit which, in relevant part, recited that:

'Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.'[1]

The search warrant was issued.

In executing the warrant, the local police, along with federal officers, announced at petitioner's door that they ***110** were police with a warrant. Upon hearing a commotion within the house, the officers forced their way into the house and seized petitioner in the act of attempting to dispose of a packet of narcotics.

At his trial in the state court, petitioner, through his attorney, objected to the introduction of evidence obtained as a result of the execution of the warrant. The objections were overruled and the evidence admitted. Petitioner was convicted of illegal possession of heroin and sentenced to serve 20 years in the state penitentiary.[2] On appeal to the Texas Court of Criminal Appeals, the conviction was affirmed, 172 Tex.Cr.R. 629, 362 S.W.2d 111, affirmance upheld on rehearing, 172 Tex.Cr.R. 631, 362 S.W.2d 112. We granted a writ of certiorari to consider the important constitutional questions involved. 375 U.S. 812, 84 S.Ct. 86, 11 L.Ed.2d 48.

****1512** In Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726, we held that the Fourth 'Amendment's proscriptions are enforced against the States through the Fourteenth Amendment,' and that 'the standard of reasonableness is the same under the Fourth and Fourteenth Amendments.' Id., 374 U.S. at 33, 83 S.Ct. at 1630. Although Ker involved a search without a warrant, that case must certainly be read as holding that the standard for obtaining a search warrant is likewise 'the same under the Fourth and Fourteenth Amendments.'

An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action ***111** of officers * * * who may happen to make arrests.' United States v. Lefkowitz, 285 U.S. 452, 464, 52 S.Ct. 420, 423, 76 L.Ed. 877: The reasons for this rule go to the foundations of the Fourth Amendment. A contrary rule 'that evidence sufficient

to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.' Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436. Under such a rule 'resort to (warrants) would ultimately be discouraged.' Jones v. United States, 362 U.S. 257, 270, 80 S.Ct. 725, 736, 4 L.Ed.2d 697. Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' ibid., and will sustain the judicial determination so long as 'there was substantial basis for (the magistrate) to conclude that narcotics were probably present * * *.' Id., 362 U.S. at 271, 80 S.Ct. at 736. As so well stated by Mr. Justice Jackson:

'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 neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, 333 U.S. at 13—14, 68 S.Ct. at 369

Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police.

***112** In Nathanson v. United States, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159, a warrant was issued upon the sworn allegation that the affiant 'has cause to suspect and does believe' that certain merchandise was in a specified location. Id., 290 U.S. at 44, 54 S.Ct. at 12. The Court, noting that the affidavit 'went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts,' id., 290 U.S. at 46, 54 S.Ct. at 13 (emphasis added), announced the following rule:

'Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.' Id., 290 U.S. at 47, 54 S.Ct. at 13. (Emphasis added.)

****1513** The Court, in Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 applied this rule to an affidavit similar to that relied upon here.[3] Affiant in that case swore that petitioner 'did receive, conceal, etc., narcotic drugs * * * with knowledge of unlawful importation * * *.' Id., 357 U.S. at 481, 78 S.Ct. at 1247. The Court announced the guiding principles to be:

'that the inferences from the facts which lead to the complaint '(must) be drawn by a neutral and detached ***113** magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436. The purpose of the complaint, then, is to enable the appropriate magistrate * * * to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion * * *.' 357 U.S., at 486, 78 S.Ct., at 1250.

The Court, applying these principles to the complaint in that case, stated that:

'it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination * * * that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made.' Ibid.

The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's ***114** possession.[4] The ****1514** magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on * * * to show

probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, was 'credible' or his information 'reliable.'[5] Otherwise, ***115** 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' Giordenello v. United States, supra, 357 U.S. at 486, 78 S.Ct. at 1250; Johnson v. United States, supra, 333 U.S. at 14, 68 S.Ct. at 369, or, as in this case, by an unidentified informant.

We conclude, therefore, that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause and that ***116** the evidence obtained as a result of the search warrant was inadmissible in petitioner's trial.

****1515** The judgment of the Texas Court of Criminal Appeals is reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice HARLAN, concurring.

But for Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726, I would have voted to affirm the judgment of the Texas court. Given Ker, I cannot escape the conclusion that to do so would tend to 'relax Fourth Amendment standards * * * in derogation of law enforcement standards in the federal system * * *' (my concurring opinion in Ker, supra, 374 U.S. at 45—46, 83 S.Ct. at 1646). Contrary to what is suggested in the dissenting opinion of my Brother CLARK in the present case (post, p. 1516, note 1), the standards laid down in Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503, did in my view reflect constitutional requirements. Being unwilling to relax those standards for federal prosecutions, I concur in the opinion of the Court.

Mr. Justice CLARK, whom Mr. Justice BLACK and Mr. Justice STEWART join, dissenting.

First, it is well to point out the information upon which the search warrant in question was based: About January 1, 1960, Officers Strickland and Rogers from the narcotics division of the Houston Police Department received reliable information from a credible person that petitioner Aguilar had heroin and other narcotic drugs and narcotic paraphernalia in his possession at his residence, 509 Pinckney Street, Houston, Texas; after receiving this information the officers, the record indicates, kept the premises of petitioner under surveillance for about a week.

On January 8, 1960, the two officers applied for a search warrant and executed an affidavit before a justice ***117** of the peace in which they alleged under oath that petitioner's residence at 509 Pinckney Street 'is a place where we each have reason to believe and do believe that (Aguilar) * * * has in his possession therein narcotic drugs * * * for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold.' In addition and in support of their belief, the officers included in the affidavit the further allegation that they 'have received reliable information from a credible person and do believe that heroin * * * and other narcotics and narcotic paraphernalia are being kept at * * * (petitioner's) premises for the purpose of sale and use contrary to the provisions of the law.'

Upon executing the warrant issued on the strength of this affidavit, the officers knocked on the door of Aguilar's house. Someone inside asked who was there and the officers replied that they were police and that they had a search warrant. At this they heard someone 'scuffle and start to run inside of the house.' The officers entered and pursued the petitioner, who ran into a back bathroom. Petitioner threw a packet of heroin into the commode, but an officer retrieved the packet before it could be flushed down the drain.

I.

At trial petitioner objected to the introduction into evidence of the heroin obtained through execution of the search warrant on the ground that the affidavit was 'nothing more than hearsay.' The Court holds the affidavit insufficient and sets aside the conviction on the basis of two cases, neither of which is controlling.

First is Nathanson v. United States, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933). In that case the affidavit stated that the affiant had 'cause to suspect and (did) believe that certain merchandise' was in the premises described. There was nothing in Nathanson, either in the affidavit or in the other proof introduced at trial, to suggest that any facts ***118** had ****1516** been brought out to support a reasonable belief or even a suspicion. Accordingly, the Court held that '(m)ere affirmance of belief or suspicion is not enough.' 290 U.S. at 47, 54 S.Ct. at 13. But in Fourth Amendment cases findings of reasonableness or of probable cause necessarily rest on the facts and circumstances of each particular case. In Aguilar, the affidavit was based not only on 'affirmance of belief' but in addition upon 'reliable information from a credible person' plus a week's surveillance by the affiants. (Emphasis supplied.) Nathanson is, therefore, not apposite.

The second case the Court relies on is Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). There the affidavit alleged that 'Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation * * *.' The opinion of the Court, by MR. JUSTICE HARLAN, after discussing Rules 3 and 4 of the Federal Rules of Criminal Procedure, held that the defect in the complaint was that it 'does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed.' 357 U.S. at 486, 78 S.Ct. at 1250. The dissent in the case, in commenting on the Court's holding that the complaint was invalid, said: 'The Court does not strike down this complaint directly on the Fourth Amendment, but merely on an extension of Rule 4.' 357 U.S. at 491, 78 S.Ct. at 1253. Since Giordenello was a federal case, decided under our supervisory powers (Rules 3 and 4 of the Federal Rules of Criminal Procedure), it does not control here.[1] As we said in Ker v. California, 374 U.S. 23, 33, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963), 'the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and ***119** that held inadmissible because prohibited by the United States Constitution.'

Even if Giordenello was rested on the Constitution, it would not be controlling here because of the significant differences in the facts of the two cases. In Giordenello the Court said: 'The complaint * * * does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made.' 357 U.S., at 486, 78 S.Ct., at 1250. (Emphasis supplied.) Here, in Aguilar's case, the affidavit did allege a source for the complainant's belief, i.e., 'reliable information from a credible person * * * that heroin * * * and other narcotics * * * are being kept' in petitioner's premises 'for the purpose of sale and use contrary to the provisions of the law.' This takes the affidavit here entirely outside the Giordenello holding. In Giordenello no source of information was stated, whereas here there was a reliable one. The affidavit thus shows 'probable cause' within the meaning of the Fourth Amendment, as that Amendment was interpreted by this Court in Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), where it was contended that the information given by an informant to an officer was inadmissible because it was hearsay. The Court in Draper held that petitioner was 'entirely in error. Brinegar v. United States * * * has settled the question the other way.' 358 U.S. at 311, 79 S.Ct. at 332. In the following year this was reaffirmed in Jones v. United States, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed. 697 (1960): 'We conclude therefore that hearsay may be the basis ****1517** for a warrant.'[2] ***120** Furthermore, in the case of Rugendorf v. United States, decided only this Term, we held an affidavit good based on information that an informer had seen certain furs in Rugendorf's basement. 376 U.S. 528, 84 S.Ct. 825. In the Aguilar affidavit the informer told the officers that narcotics were actually 'kept at the above described premises for the purpose of sale * * *.' The Court seems to hold that what the informed says is the test of his reliability. I submit that this has nothing to do with it. The officer's experience with the informer is the test and here the two officers swore that the informer was credible and the information reliable. At the hearing on the motion to suppress Officer Strickland testified that he delayed getting the search warrant for a week in order to 'set up surveillance on the house.' The informant's statement, Officer Strickland said, was 'the first information' received and was only 'some of' that which supported the application for the warrant. The totality of the circumstances upon which the officer relied is certainly pertinent to the validity of the warrant. See the use of such testimony in Giordenello, supra, 357 U.S. at 485, 486, 78 S.Ct. at 1249, 1250. And, just as in that case, there is nothing in the record here to show what the officers verbally told the magistrate. The surveillance of Aguilar's house, which is confirmed by the State's brief, apparently gave the officers further evidence upon which they based their personal belief. Hence the affidavit here is a far cry from 'suspicion' or 'affirmance of belief.' It was based on reliable information from a credible informant plus personal surveillance by the officers.

Furthermore, the Courts of Appeals have often approved affidavits similar to the one here. See, e.g., United States v. Eisner, 297 F.2d 595 (C.A.6th Cir.); Evans v. United States, 242 F.2d 534 (C.A.6th Cir.); United States v. Ramirez, 279 F.2d 712, 715 (C.A.2d Cir.) (dictum); and ***121** United States v. Meeks, 313 F.2d 464 (C.A.6th Cir.). We denied certiorari in Eisner, 369 U.S. 859, 82 S.Ct. 947, 8 L.Ed.2d 17, although the affidavit there stated only that '(i)nformation has been obtained by S. A. Clifford Anderson * * * which he believes to be reliable * * *,' 297 F.2d at 596, and in Evans, 353 U.S. 976, 77 S.Ct. 1059, 1 L.Ed.2d 1137, where the affiant was a man who 'came to the headquarters of the federal liquor law enforcement officers and stated that he wished to give information * * *,' 242 F.2d, at 535.

In summary, the information must be more than mere wholly unsupported suspicion but less than 'would justify condemnation,' as Chief Justice Marshall said in Locke v. United States, 7 Cranch 339, 348, 3 L.Ed. 364 (1813). As Chief Justice Taft said in Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925): Probable cause exists where 'the facts and circumstances within their (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. And as Mr. Justice Rutledge so well stated in Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949):

'These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in ****1518** the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. ***122** Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.'

Believing that the Court has substituted a rigid, academic formula for the unrigid standards of reasonableness and 'probable cause' laid down by the Fourth Amendment itself—a substitution of technicality for practicality—and believing that the Court's holding will tend to obstruct the administration of criminal justice throughout the country, I respectfully dissent.

All Citations

378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723

Footnotes

1 The record does not reveal, nor is it claimed, that any other information was brought to the attention of the Justice of the Peace. It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention. Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503, 79 C.J.S. Searches and Seizures s 74, p. 872 (collecting cases). In Giordenello, the Government pointed out that the officer who obtained the warrant 'had kept petitioner under surveillance for about one month prior to the arrest.' The Court of course ignored this evidence, since it had not been brought to the magistrate's attention. The fact that the police may have kept petitioner's house under surveillance is thus completely irrelevant in this case, for, in applying for the warrant, the police did not mention any surveillance. Moreover, there is no evidence in the record that a surveillance was actually set up on petitioner's house. Officer Strickland merely testified that 'we wanted to set up surveillance on the house.' If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case.

2 Petitioner was also indicted on charges of conspiring to violate the federal narcotics cotics laws. Act of February 9, 1909, c. 100, 35 Stat. 614, s 2, as amended, 21 U.S.C. s 174; Internal Revenue Code of 1954, s 7237(b), as amended, 26 U.S.C. s 7237(b). He was found not guilty by the jury. His codefendants were found guilty and their convictions affirmed on appeal. Garcia v. United States, 5 Cir., 315 F.2d 679.

3 In Giordenello, although this Court construed the requirement of 'probable cause' contained in Rule 4 of the Federal Rules of Criminal Procedure, it did so 'in light of the constitutional' requirement of probable cause which that Rule implements. Id., 357 U.S. at 485, 78 S.Ct. at 1250. The case also involved an arrest warrant rather than a search warrant, but the Court

said: 'The language of the Fourth Amendment, that '* * * no Warrants shall issue, but upon probable cause * * *' of course applies to arrest as well as search warrants.' Id., 357 U.S., at 485—486, 78 S.Ct., at 1250. See Ex parte Burford, 3 Cranch 448, 2 L.Ed. 495; McGrain v. Daugherty, 273 U.S. 135, 154—157, 47 S.Ct. 319, 71 L.Ed. 580. The principles announced in Giordenello derived, therefore, from the Fourth Amendment, and not from our supervisory power. Compare Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103. Accordingly, under Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726, they may properly guide our determination of 'probable cause' under the Fourteenth Amendment.

4 To approve this affidavit would open the door to easy circumvention of the rule announced in Nathanson and Giordenello. A police officer who arrived at the 'suspicion,' 'belief' or 'mere conclusion' that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had 'received reliable information from a credible person' that the narcotics were in someone's possession.

5 Such an affidavit was sustained by this Court in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697. The affidavit in that case reads as follows:

'Affidavit in Support of a U.S. Commissioners Search Warrant for Premises, 1436 Meridian Place, N.W., Washington, D.C., apartment 36, including window spaces of said apartment. Occupied by Cecil Jones and Earline Richardson.

'In the late afternoon of Tuesday, August 20, 1957, I, Detective Thomas Didone, Jr. received information that Cecil Jones and Earline Richardson were involved in the illicit narcotic traffic and that they kept a ready supply of heroin on hand in the above mentioned apartment. The source of information also relates that the two aforementioned persons kept these same narcotics either on their person, under a pillow, on a dresser or on a window ledge in said apartment. The source of information goes on to relate that on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above mentioned persons and that the narcotics were secreated (sic) in the above mentioned places. The last time being August 20, 1957.

'Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.

'This same information, regarding the illicit narcotic traffic, conducted by Cecil Jones and Earline Richardson, has been given to the undersigned and to other officers of the narcotic squad by other sources of information.

'Because the source of information mentioned in the opening paragraph has given information to the undersigned on previous occasion and which was correct, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated (sic) in the above apartment by Cecil Jones and Earline Richardson.

'Det. Thomas Didone, Jr.,

Narcotics Squad, MPDC.

'Subscribed and sworn to before me this 21 day of August, 1957.

'James F. Splain, U.S. Commissioner, D.C.' Id., 362 U.S. at 267—268, n. 2, 80 S.Ct. at 734.

Compare, e.g., Hernandez v. People, 385 P.2d 996, where the Supreme Court of Colorado, accepting a confession of error by the State Attorney General, held that a search warrant similar to the one here in issue violated the Fourth Amendment. The court said:

'Before the issuing magistrate can properly perform his official function he must be apprised of the underlying facts and circumstances which show that there is probable cause * * *.' Id., 385 P.2d, at 999.

1 MR. JUSTICE BLACK, who joined the Court's opinion in Giordenello, joins this dissent on the basis of his belief that Giordenello was based on Rule 4 and not on the less exacting requirements of the Fourth Amendment.

2 The affidavit in Jones was more detailed, including a statement of where the heroin might be found, viz., 'on their person, under a pillow, on a dresser or on a window ledge in said apartment.' But this detail adds nothing to the reliability of the information furnished. Likewise, the allegation in Jones that the informer had 'on previous occasion' given information 'which was correct' was contained in substance in the Aguilar affidavit.

23 Md.App. 655
Court of Special Appeals of Maryland.

Ellis Harley BARBER
v.
STATE of Maryland.

No. 230.
|
Dec. 17, 1974.

Synopsis

Defendant was convicted before the Circuit Court, Prince George's County, William B. Bowie, J., of grand larceny and he appealed. The Court of Special Appeals, Thompson, J., held that where owner of diamond ring testified that the ring was a gift and that he did not, in fact, know the market value of the ring, although he opined that its value was $150 and he gave no testimony as to value of bottle of medicinal pills, the testimony of the owner was not sufficient, in and of itself, to establish that the value of the goods taken was more than $100 and did not establish commission of grand larceny. The Court further held that there was sufficient proof of informer's credibility to give officers probable cause to stop and search defendant's automobile; and that counterfeit driver's license, counterfeit birth certificates and counterfeit identification cards, which were seized in the search of the automobile, were inadmissible as being evidence of other crimes.

Reversed and remanded.

Attorneys and Law Firms

****761** ***656** Paul D. Wright, III, Assigned Public Defender, with whom was Edward P. Camus, Dist. 5 Public Defender, Riverdale, on the brief, for appellant.

Bernard A. Raum, Asst. Atty. Gen., with whom were Francis B. Burch, Atty. Gen., and Arthur A. Marshall, Jr., State's Atty., for Prince George's County, and Alan E. D'Appolito, Asst. State's Atty., for Prince George's County, on the brief, for appellee.

Argued before THOMPSON, GILBERT and DAVIDSON, JJ.

Opinion

THOMPSON, Judge.

Ellis Harley Barber, appellant, was convicted of grand larceny by the Circuit Court for Prince George's County. He contends on appeal that the State failed to establish that the value of the stolen goods exceeded $100.00; therefore, his motion for acquittal should have been granted. We agree. We shall also discuss the validity of a search and seizure and the admissibility of certain evidence for the guidance of the trial court on retrial.

I Value

The record shows that the only goods stolen were a box of pills and a diamond ****762** ring. The State offered no evidence concerning the value of the pills. As to the diamond ring, during direct examination, the State's Attorney asked the owner, 'Can you state for the benefit of the Court and the jury what the fair market value of this ring is?' A. 'I would say approximately a hundred and fifty dollars.' On cross-examination the owner testified she did not know the fair market value, and that the ring was a gift.

Although the law is well established that an owner is presumed to know the market value of his possessions and is ***657** permitted to give his opinion thereon, when the record shows that he does not in fact know the market value, his opinion, even though perhaps in some cases admissible, is not alone sufficient to establish value. This is especially true where the value of the stolen goods barely exceeds $100, the amount which must be proven to support a charge of grand larceny. Md.Code, Art. 27, s 340. The Court of Appeals reviewed this question carefully in Cofflin v. State, 230 Md. 139, 142, 186 A.2d 216, 218 (1962) and stated:

'It is well settled in this State that an owner of personal property in common use any express an opinion as to its value without qualification as an expert. Bresnan v. Weaver, 151 Md. 375, 378, 135 A. 584; Bailey v. Ford, 151 Md. 664, 667, 135 A. 835; Pennsylvania Thresherman & Farmers' Mutual Casualty Ins. Co. v. Messenger, 181 Md. 295, 302, 29 A.2d 653; Jackson v. Linthicum, 192 Md. 272, 276, 64 A.2d 133. Cf. State Roads Com. of Md. v. Novosel, 203 Md. 619, 624, 102 A.2d 563. The case of Mutual Fire Ins. Co., etc. v. Owen, 148 Md. 257, 267, 129 A. 214, is not here in point. The testimony of the owner's wife was admitted on the theory that she had taken an inventory of the goods, in her husband's store, at cost, based on actual records and in a few instances on wholesale catalogue prices. The rule applies in criminal

as well as civil cases. Jewell v. State, 216 Md. 110, 112, 139 A.2d 707; Shipley v. State, 220 Md. 463, 466, 154 A.2d 708; Benton v. State, 228 Md. 309, 311, 179 A.2d 718. The rule is almost universally recognized. See Underhill, Criminal Evidence (5th ed.) s 603 p. 1474; Wigmore, Evidence (3rd ed.) s 716; 2 Wharton, Criminal Evidence (12th ed.) s 550. The cases are collected in an exhaustive note 37 A.L.R.2d 967. Wigmore, in an often quoted passage, seems to take the position that an owner is qualified per se, and that any lack of knowledge goes only to the weight of the evidence. But many courts have held that ownership establishes a rebuttable presumption of knowledge. See Sykes v. Wood, 206 Ala. 534, 91 So. 320 and cases collected in 37 A.L.R.2d supra, p. 984 et seq. It has been held that the rule does not rest on ***658** the fact that the owner has title, but rather on the fact that ordinarily an owner knows the property intimately and is familiar with its value. Menici v. Orton Crane & Shovel Co., 285 Mass. 499, 189 N.E. 839. See also Shea v. Hudson, 165 Mass. 43, 42 N.E. 114, cited in both the Bresnan and Bailey cases, supra, in 151 Md., and in the Messenger case as well. Thus, an owner who has purchased the property in question or similar property would normally have some knowledge of its market price and present condition. In Rubin v. Town of Arlington, 327 Mass. 382, 99 N.E.2d 30 it was held that the qualification of an owner presented a preliminary question of fact for the trial judge, and this is the rule in other States. Thus, if it is demonstrated that the owner possesses no knowledge whatever of the market price and condition of the article in question, his testimony may be inadmissible. In Shipley v. State, supra, we noted that it was held in Narango v. State, 87 Tex.Cr.R. 493, 222 S.W. 564, that a bailee may likewise testify to value without qualification, but we found it unnecessary to pass on the point in that case.'

****763** The Wigmore view referred to by the Court of Appeals in Cofflin, seems to have been modified in later editions. 3 Wigmore on Evidence s 716 (Chadbourn rev. 1970) states as follows:
'Knowledge of value standard; what tests are proper? (continued): Personal-property value. Here the general test, that any one familiar with the values in question may testify, is liberally applied, and with few attempts to lay down detailed minor tests.[1]

'The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury; and courts have usually made no objections to this policy.[2]

***659** 'However, where it appears (either expressly or by reasonable inference) that the owner in fact lacks knowledge of the particular value at issue, his opinion may be ruled inadmissible.[3]

'The general rule that any owner may evaluate his own property does not apply to one who merely holds legal title and has not enjoyed the usual incidents of personal ownership.[4]'

In s 716, note 2, a number of cases are cited which hold that even though such evidence may at times be admissible, it is insufficient alone to sustain a finding of value. Other notes in the quote cite case authority for the point discussed.

In Shipley v. State, 220 Md. 463, 467, 154 A.2d 708, 710 (1959), the Court pointed out a further refinement of the rule pertaining to proof of value in a grand larceny case as follows: 'In such a case as this, where a portion of the stolen goods was before the trier of facts, together with a detailed list of the other clothing stolen, and the goods stolen were ordinary articles of clothing, the court or jury weighing the evidence could value the goods without the aid of expert testimony. 20 Am.Jur. Evidence s 894 (1939); State v. Peach, 70 Vt. 283, 40 A. 732; 3 Underhill, Criminal Evidence s 720 (5th Ed., 1957). Cf. 32 C.J.S. Evidence s 545, P. 280 (1942). We think the lower court could reasonably infer from the clothing before it and from the description of the other articles stolen, and from the fact that the average value of each article need be only $1.45 for the total to exceed $100, that goods of a value in excess of $100 actually were stolen.'

This refinement is, of course, no help to us in deciding the instant case because it is apparent that a jury cannot adequately determine the value of a diamond ring or a bottle of medicine simply by looking at them. We, therefore hold that the testimony of the owner was not sufficient in and of itself to establish that the goods taken were worth ***660** more than $100.00. We have held an owner's statement of value insufficient to support a conviction for grand larceny when it was shown he did not know the market value. Mason v. State, 9 Md.App. 61, 262 A.2d 576 (1970), cert. denied, 258 Md. 729; Gazaille v. State, 2 Md.App. 462, 235 A.2d 306 (1967). Compare Jones v. State, 6 Md.App. 344, 251 A.2d 46 (1969).

II Seizures

Detective David Van Dyke of the Prince George's County Police testified that on April 19, 1973, he received a telephone call from an informant stating that the appellant, Pinkey Barber, and George Vermillion had just broken into an apartment on 85th Avenue in New Carrollton; that they were in a gray '56 Chevrolet; and that they were still in the area.

Detective Van Dyke relayed the information he had received to Detective Mark Nelson who immediately went with Detective McLamb to the area in question. As they approached the area, they observed a gray and green 1956 Chevrolet coming in ****764** their direction in the opposite lane of traffic. They also saw that the car was occupied by two white males. Inasmuch as traffic precluded the two detectives from following the car, they called uniformed Officers Cherba and Nugent who were in a police car nearby and asked them to make a traffic stop of the vehicle. In response to this call, Officer Cherba and Officer Nugent stopped the vehicle in question which was being operated by the appellant, Ellis Harley Barber. Barber produced his driver's license and registration card. In less than a minute, Detectives Nelson and McLamb arrived at the scene. Detective Nelson then approached the car and asked Mr. Vermillion to step out; he also asked if he was in fact George Vermillion. Vermillion replied 'Yes.' Detective Nelson then looked into the vehicle which was a convertible with the top down. He saw a plastic bag containing what he thought to be marijuana. He stated that he had seen marijuana numerous times before and recognized it on sight. He added that he had had formal training in the Police Academy and had been involved in numerous 'narcotics' cases. The officers then ***661** proceeded to search the car and found a master key, a diamond ring, a pill container with prescription pills in it, five gloves, a meat cleaver and two two-way radios. They also found an Indiana driver's license, a birth certificate and a chemical company identification card which were all counterfeit. All of the items except the meat cleaver and a table radio (which were found in the trunk) were found in the interior of the car. Officer Cherba testified that they stopped the vehicle only because of the request of the detectives and that Mr. Barber was violating no traffic laws at the time. The trial judge denied the motion to suppress the diamond ring, the pills, the key, the two walkie-talkies, the gloves and the packet of I.D. cards.

On direct examination Detective Van Dyke stated that the aforementioned informant had previously given him information on fifteen or twenty occasions. On each occasion Van Dyke had checked the information out and it had proven to be correct. On cross-examination, Van Dyke stated that the informant had at one time told him that two persons who were involved in trafficking drugs would meet at a specified time. Based on this information he went to the location and observed a narcotics transaction in progress but did not at that time make an arrest. The officer further stated that the informant had taken him to various locations in Prince George's County for the purpose of pointing out the residences of persons who dealt in drugs. He stated that a search and seizure warrant was issued as to one of these locations and that the search revealed narcotics. This, however, did not occur until after April 19, 1973 (the date of appellant's arrest). He also stated that as a result of information furnished by this informant other cases were being pursued but that no arrests or seizures had as yet resulted. A check of the Prince George's County's files, however, indicated that the persons involved had been previously engaged in narcotic transactions.

The appellant claims that the State failed to show that the informant in the case at bar met the two-pronged test of Aguilar and Spinelli.[1]

***662** We hold the requirements of Aguilar-Spinelli were met, albeit by the narrowest margin. It is apparent that the information relied on by the detective in his determination that the informant was credible was minimal. When the informant gave him the information regarding the appellant, Van Dyke had observed one illegal transaction and had verified from police files that the other persons named had prior drug arrests. We are thus faced ****765** with holding that the informant's credibility was established simply by the observation of Detective Van Dyke of one illegal transaction. This conclusion is supported somewhat by the fact that all other information furnished, although possibly received from unreliable sources, nonetheless proved accurate. Although it is the thinnest evidence on which we have held an informant reliable under the credibility prong of Aguilar, we think it is sufficient. See State v. Edwards, 266 Md. 515, 295 A.2d 465 (1972), State v. Kraft, 269 Md. 583, 307 A.2d 683 (1973), McCarthy v. State, 22 Md.App. 722, 325 A.2d 132 (1974). The statement of the detective that he had actually observed the narcotics transaction occurring at the time and place previously indicated by the informant when coupled with a track record showing the absence of false information is at least as reliable as a track record which shows that two or three arrests have been made as a result of information furnished by the informant.

We also think the 'basis of knowledge' prong of Aguilar has been satisfied. In this regard the instant case comes

within the rule established in Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). In Draper a reliable informant advised the officers that a particularly described man carrying a briefcase would arrive on the train at a particular time. Although the suspect arrived twenty-four hours later than the informer had predicted the Court held that since the future movements of the suspect were detailed by the informant, the details were sufficient in themselves to establish the basis of knowledge required ***663** by Aguilar even though the informant neglected to state how he had obtained this information. For a full discussion, see Stanley v. State, 19 Md.App. 507, 313 A.2d 847 (1974) and McCarthy v. State, supra.

In the instant case, the information furnished by the informant was detailed and specific. He stated that George Vermillion and Pinkey Barber (the appellant) had just broken into an apartment on 85th Avenue, Now Carrollton, that they were in a 1956 gray Chevrolet and that they were still in the area. The reference to the fact that the crime had just been committed; that the culprits were still in the area; and that the crime had occurred at a specifically named location; all indicate that the informer was speaking from present, first-hand knowledge and not from a 'casual rumor circulating in the underworld.' Spinelli v. United States, supra, 393 U.S. at 416, 89 S.Ct. at 589. Indeed under the circumstances it is difficult to imagine a more detailed statement unless the informant was himself a participant in the crime. Thus, although the informant did not in fact disclose the basis of his knowledge, a sufficient basis was established by the self-verifying detail contained in the information itself.

If the officers had probable cause to believe that the occupants of the vehicle were guilty of breaking and entering, there was also probable cause to believe that the vehicle contained evidence of the crime. Consequently, it was subject to a full search. Compare Howell v. State, 271 Md. 378, 318 A.2d 189 (1974) and Dixon v. State, 23 Md.App. 19, 327 A.2d 516, filed October 14, 1974.

Under Md.Code, Art. 66 1/2, s 6-112, a uniformed officer has the authority to stop and check the driver's license and registration of any operator of a motor vehicle. Shipley v. State, 243 Md. 262, 267, 220 A.2d 585 (1966) and Taylor v. State, 9 Md.App. 402, 406, 264 A.2d 870 (1970). While the vehicle was stopped one of the officers involved observed what he recognized from his experience to be marijuana. This information leads to the conclusion that the vehicle might well have contained other prohibited substances and a search of the vehicle was then proper. In such a situation, the seizure of the bottle of pills would be reasonable despite ***664** the fact that they were contained in a bottle showing ****766** that the original contents had been obtained by prescription. It will be noted that the diamond ring was found within the bottle. Although the police officers at the time of the seizure did not know that the pills were fruits of the breaking and entering, it became apparent after it was discovered that the master key fit the apartment of the victim and that the diamond ring and the bottle of pills were missing.

The stopping of the vehicle could also be justified under another theory. In Adams v. Williams, 407 U.S. 143, 148, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), a police officer was told by an informer, whom the police officer knew and who had provided him with information in the past, that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. After calling for assistance, the officer approached the vehicle to investigate the informant's report. The officer tapped on the car window and asked the occupant, Williams, to open the door. When Williams rolled down the window instead, the officer reached into the car and removed a fully loaded revolver from Williams waistband. The gun was not visible from outside the car. Williams was thereupon arrested for unlawful possession of the pistol. A search incident to the arrest was conducted by other officers who arrived at the scene. They found substantial quantities of heroin on Williams' person and in the car, and they found a machete and a second revolver hidden in the automobile.

In holding that the stop was legal under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Court stated:

'. . . while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, see, e.g., Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.' 407 U.S. at 147, 92 S.Ct. at 1924.

***665** The 'indicia of reliability' in Adams were the fact that the informer was known to the officer and had given him information in the past. Also deemed important by the Court was the fact that under a state statute the informer could have been charged with a misdemeanor if the information had been false.

The holding in Adams applies with equal force to the instant case. Here the informer was known to Detective Van Dyke.

He had given information in the past which had been verified. Finally, as in Adams, the informer in the case at bar was subject to criminal penalties if he was lying to the police. Md. Code, Art. 27, s 150. In short, we hold that there were enough 'indicia of reliability' regarding the informant to warrant reliance by police.

III Admissibility of Evidence

Finally appellant argues that the trial court erred in admitting the counterfeit driver's license, counterfeit birth certificates and counterfeit identification cards which were seized in the search of the motor vehicle. It is apparent that this evidence was not in any way related to the crime involved in these proceedings. Generally, evidence of other crimes can be admitted only where it tends to show identity, a common scheme or design, motive, intent, or absence of mistake or accident, if such showing has relevance in establishing the principal fact at issue or matter in dispute. Ward v. State, 219 Md. 559, 563, 150 A.2d 257 (1958); Wilson, Valentine & Nutter v. State, 8 Md.App. 653, 665, 262 A.2d 91 (1970). We think that on retrial these items should be excluded from evidence as not coming within the rule.

Judgment reversed.

Case remanded for new trial.

All Citations

23 Md.App. 655, 329 A.2d 760

Footnotes

1 Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

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79 S.Ct. 329
Supreme Court of the United States

James Alonzo DRAPER, Petitioner,
v.
UNITED STATES of America.

No. 136.
|
Argued Dec. 11, 1958.
|
Decided Jan. 26, 1959.

Synopsis

Prosecution for knowingly concealing and transporting narcotic drugs in violation of federal narcotics laws. The United States District Court for the District of Colorado, 146 F.Supp. 689, denied defendant's motion for suppression of evidence and, after trial, a judgment of conviction was entered, and defendant appealed. The Court of Appeals, 248 F.2d 295, affirmed and defendant was granted certiorari. The Supreme Court, Mr. Justice Whittaker, held that where a government agent was given information by an informer who had proved reliable in the past, that defendant, who was unknown to agent, would alight from a certain train on either of two days, wearing certain clothing, and carrying a tan zipper bag, and would be walking fast, and carrying narcotics, and agent observed defendant who fitted the description given agent alighting from one of the named trains, agent had probable cause and reasonable grounds for believing that defendant was committing a violation of the federal laws relating to narcotic drugs, and therefore heroin discovered in search incident to lawful arrest which agent effected after so observing defendant was competent evidence.

Affirmed.

Mr. Justice Douglas dissented.

Attorneys and Law Firms

****330** ***307** Mr. Osmond K. Fraenkel, New York City, for petitioner.

***308** Mr. Leonard B. Sand, Washington D.C., for respondent.

Opinion

Mr. Justice WHITTAKER delivered the opinion of the Court.

Petitioner was convicted of knowingly concealing and transporting narcotic drugs in Denver, Colorado, in violation of 35 Stat. 614, as amended, 21 U.S.C. § 174, 21 U.S.C.A. § 174. His conviction was based in part on the use in evidence against him of two "envelopes containing [865 grams of] heroin" and a hypodermic syringe that had been taken from his person, following his arrest, by the arresting officer. Before the trial, he moved to suppress that evidence as having been secured through an unlawful search and seizure. After hearing, the District Court found that the arresting officer had probable cause to arrest petitioner without a warrant ane that the subsequent search and seizure were therefore incident to a lawful arrest, and overruled the motion to suppress. 146 F.Supp. 689. At the subsequent trial, that evidence was offered and, over petitioner's renewed objection, was received in evidence, and the trial resulted, as we have said, in petitioner's conviction. The Court of Appeals affirmed the conviction, 10 Cir., 248 F.2d 295, and certiorari was sought on the sole ground that the search and seizure violated the Fourth Amendment[1] and therefore the use of the heroin in evidence vitiated the conviction. We granted the writ to determine that question. 357 U.S. 935, 78 S.Ct. 1386, 2 L.Ed.2d 1549.

****331** ***309** The evidence offered at the hearing on the motion to suppress was not substantially disputed. It established that one Marsh, a federal narcotic agent with 29 years' experience, was stationed at Denver; that one Hereford had been engaged as a "special employee" of the Bureau of Narcotics at Denver for about six months, and from time to time gave information to Marsh regarding violations of the narcotic laws, for which Hereford was paid small sums of money, and that Marsh had always found the information given by Hereford to be accurate and reliable. On September 3, 1956, Hereford told Marsh that James Draper (petitioner) recently had taken up abode at a stated address in Denver and "was peddling narcotics to several addicts" in that city. Four days later, on September 7, Hereford told Marsh "that Draper had gone to Chicago the day before [September 6] by train [and] that he was going to bring back three ounces of heroin [and] that he would return to Denver either on the morning of the 8th of September or the morning of the 9th of September also by train." Hereford also gave Marsh a detailed physical description of Draper and of the clothing he was wearing,[2] and said that he would be carrying "a tan zipper bag," and that he habitually "walked real fast."

On the morning of September 8, Marsh and a Denver police officer went to the Denver Union Station and kept watch over all incoming trains from Chicago, but they did not see anyone fitting the description that Hereford had given. Repeating the process on the morning of September 9, they saw a person, having the exact physical attributes and wearing the precise clothing described by Hereford, alight from an incoming Chicago train and ***310** start walking "fast" toward the exit. He was carrying a tan zipper bag in his right hand and the left was thrust in his raincoat pocket. Marsh, accompanied by the police officer, overtook, stopped and arrested him. They then searched him and found the two "envelopes containing heroin" clutched in his left hand in his raincoat pocket, and found the syringe in the tan zipper bag. Marsh then took him (petitioner) into custody. Hereford died four days after the arrest and therefore did not testify at the hearing on the motion.

26 U.S.C. (Supp. V) § 7606, added by § 104(a) of the Narcotic Control Act of 1956, 70 Stat. 570, 26 U.S.C.A. § 7607, provides, in pertinent part:

> "The Commissioner * * * and agents, of the Bureau of Narcotics * * * may—
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs * * * where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The crucial question for us then is whether knowledge of the related facts and circumstances gave Marsh "probable cause" within the meaning of the Fourth Amendment, and "reasonable grounds" within the meaning of § 104(a), *supra,*[3] to believe that petitioner had committed or was committing a violation of the narcotic laws. If it did, the arrest, though without a warrant was lawful ***311** and the ****332** subsequent search of petitioner's person and the seizure of the found heroin were validly made incident to a lawful arrest, and therefore the motion to suppress was properly overruled and the heroin was competently received in evidence at the trial. Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652; Carroll v. United States,267 U.S. 132, 158, 45 S.Ct. 280, 287, 69 L.Ed. 543; Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145; Giordenello v. United States, 357 U.S. 480, 483, 78 S.Ct. 1245, 1248, 2 L.Ed.2d 1503.

Petitioner does not dispute this analysis of the question for decision. Rather, he contends (1) that the information given by Hereford to Marsh was "hearsay" and, because hearsay is not legally competent evidence in a criminal trial, could not legally have been considered, but should have been put out of mind, by Marsh in assessing whether he had "probable cause" and "reasonable grounds" to arrest petitioner without a warrant, and (2) that, even if hearsay could lawfully have been considered, Marsh's information should be held insufficient to show "probable cause" and "reasonable grounds" to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant.

Considering the first contention, we find petitioner entirely in error. Brinegar v. United States, 338 U.S. 160, 172-173, 69 S.Ct. 1302, 1309 93 L.Ed. 1879, has settled the question the other way. There, in a similar situation, the convict contended "that the factors relating to inadmissibility of the evidence [for] *purposes of proving guilt at the trial,* deprive[d] the evidence as a whole of sufficiency to show probable cause for the search * * *." Id., 338 U.S. 172, 69 S.Ct. 1309. (Emphasis added.) But this Court, rejecting that contention, said: "[T]he so-called distinction places a wholly unwarranted emphasis upon the criterion of admissibility in evidence, to prove the accused's guilt, of the facts relied upon to show probable cause. That emphasis, we think, goes much too far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is ***312** required to show probable cause for arrest or search. It approaches requiring (if it does not in practical effect require) proof sufficient to establish guilt in order to substantiate the existence of probable cause. There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them."[4] 338 U.S. at pages 172-173, 69 S.Ct. at page 1309.

****333** Nor can we agree with petitioner's second contention that Marsh's information was insufficient to show probable cause and reasonable grounds to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant. The information given to narcotic agent Marsh by "special employee" ***313** Hereford may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been

found accurate and reliable, it is clear that Marsh would have been derelict in his duties had he not pursued it. And when, in pursuing that information, he saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described, alight from one of the very trains from the very place stated by Hereford and start to walk at a "fast" pace toward the station exit, Marsh had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true.

"In dealing with probable cause, * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, supra, 338 U.S. at page 175, 69 S.Ct. at page 1310. Probable cause exists where "the facts and circumstances within their [the arresting 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. Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288.[5]

***314** We believe that, under the facts and circumstances here, Marsh had probable cause and reasonable grounds to believe that petitioner was committing a violation of the laws of the United States relating to narcotic drugs at the time he arrested him. The arrest was therefore lawful, and the subsequent search and seizure, having been made incident to that lawful arrest, were likewise valid.[6] It follows that petitioner's motion to suppress was properly denied and that the seized heroin was competent evidence lawfully received at the trial.

Affirmed.

The CHIEF JUSTICE and Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, dissenting.

Decisions under the Fourth Amendment,[1] taken in the long view, have not ****334** given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike. If the word of the informer ***315** on which the present arrest was made is sufficient to make the arrest legal, his word would also protect the police who, acting on it, hauled the innocent citizen off to jail.

Of course, the education we receive from mystery stories and television shows teaches that what happened in this case is efficient police work. The police are tipped off that a man carrying narcotics will step off the morning train. A man meeting the precise description does alight from the train. No warrant for his arrest has been—or, as I see it, could then be—obtained. Yet he is arrest; and narcotics are found in his pocket and a syringe in the bag he carried. This is the familiar pattern of crime detection which has been dinned into public consciousness as the correct and efficient one. It is, however, a distorted reflection of the constitutional system under which we are supposed to live.

With all due deference, the arrest made here on the mere word of an informer violated the spirit of the Fourth Amendment and the requirement of the law, 26 U.S.C. (Supp. V) § 7607, 26 U.S.C.A. § 7607, governing arrests in narcotics cases. If an arrest is made without a warrant, the offense must be committed in the presence of the officer or the officer must have "reasonable grounds to believe that the person to be arrested has committed or is committing" a violation of the narcotics law. The arresting officers did not have a bit of evidence, known to them and as to which they could take an oath had they gone to a magistrate for a warrant, that petitioner had committed any crime. The arresting officers did not know the grounds on which the informer based his conclusion; nor did they seek to find out what they were. They acted solely on the informer's word. In my view that was not enough.

The rule which permits arrest for felonies, as distinguished from misdemeanors, if there are reasonable grounds for believing a crime has been or is being committed (Carroll v. United States, 267 U.S. 132, 157, 45 S.Ct. 280, 286, 69 L.Ed. 543), ***316** grew out of the need to protect the public safety by making prompt arrests. Id. Yet, apart from those cases

where the crime is committed in the presence of the officer, arrests without warrants, like searched without warrants, are the exception, not the rule in our society. Lord Chief Justice Pratt in Wilkes v. Wood, 19 How.St.Tr. 1153, condemned not only the odious general warrant,[2] in which the name of the citizen to be arrested was left blank, but the whole scheme of seizures and searches[3] under "a discretionary power" of law officers to ****335** act "wherever their suspicions may chance to fall"—a practice which he denounced as "totally subversive of the liberty of the subject." Id., at 1167. See III May, Constitutional History of England, c. XI. Wilkes had written in 1762, "To take any man into custody, and deprive him of his liberty, without having some seeming foundation at least, on which to justify such a step, is inconsistent with wisdom and sound policy." The Life and Political Writings of John Wilkes, p. 372.

George III in 1777 pressed for a bill which would allow arrests on suspicion of treason committed in America. The words were "suspected of" treason and it was to these words that Wilkes addressed himself in Parliament. "There is not a syllable in the Bill of the degree of probability attending the *suspicion.* * * * Is it possible, Sir, to give more despotic powers to a bashaw of the Turkish ***317** empire? What security is left for the devoted objects of this Bill against the malice of a prejudiced individual, a wicked magistrate * * *?" The Speeches of Mr. Wilkes, p. 102.

These words and the complaints against which they were directed were well known on this side of the water. Hamilton wrote about "the practice of arbitrary imprisonments" which he denounced as "the favorite and most formidable instruments of tyranny." The writs of assistance, against which James Otis proclaimed,[4] were vicious in the same way as the general warrants, since they required no showing of "probable cause" before a magistrate, and since they allowed the police to search on suspicion and without "reasonable grounds" for believing that a crime had been or was being committed. Otis' protest was eloquent; but he lost the case. His speech, however, rallied public opinion. "Then and there," wrote John Adams, "the child Independence was born." 10 Life and Works of John Adams (1856), p. 248.

The attitude of Americans to arrests and searches on suspicion was also greatly influenced by the *lettres de cachet* extensively used in France.[5] This was an order emanating from the King and countersigned by a minister directing the seizure of a person for purposes of immediate imprisonment or exile. The ministers issued the *lettres* in an arbitrary manner, often at the request of the head of a noble family to punish a deviant son or relative. See Mirabeau, A Victim of the Lettres de Cachet, 3 Am.Hist.Rev. 19. One who was so arrested ***318** might remain incarcerated indefinitely, as no legal process was available by which he could seek release. "Since the action of the government was secret, his friends might not know whither he had vanished, and he might even be ignorant of the cause of his arrest." 8 The Camb.Mod.Hist. 50. In the Eighteenth Century the practice arose of issuing the *lettres* in blank, the name to be filled in by the local mandatory. Thus the King could be told in 1770 "that no citizen of your realm is guaranteed against having his liberty sacrificed to revenge. For no one is great enough to be beyond the hate of some minister, nor small enough to be beyond the hate of some clerk." III Encyc.Soc.Sci. 138. As Blackstone wrote, "* * * if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown,) there would soon be an end of all other rights and immunities." I Commentaries (4th ed. Colley)* 135.

****336** The Virginia Declaration of Rights, adopted June 12, 1776, included the forerunner of the Fourth Amendment:[6]

> "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and *supported by evidence,* are grievous and oppressive, and ought not to be granted." Section 10. (Italics added.)

The requirement that a warrant of arrest be "supported by evidence" was by then deeply rooted in history. And it is inconceivable that in those days, when the right of ***319** privacy was so greatly cherished, the mere word of an informer—such as we have in the present case—would be enough. For whispered charges and accusations, used in lieu of evidence of unlawful acts, were the main complaint of the age. Frisbie v. Butler, Kirby, Conn., p. 214 (1785-1788), decided in 1787, illustrates, I think, the mood of the day in the matter of arrests on suspicion. A warrant of arrest and search was issued by a justice of the peace on the oath of a citizen who had lost some pork from a cellar, the warrant stating, "said Butler suspects one Benjamin Frisbie, of Harwinton, to be the person that hath taken said pork." The court on appeal reversed the judgment of conviction, holding *inter alia* that the complaint "contained no direct charge of the theft,

but only an averment that the defendant was suspected to be guilty." Id., at page 215. Nothing but suspicion id shown in the instant case—suspicion of an informer, not that of the arresting officers. Nor did they seek to obtain from the informer any information on which he based his belief. The arresting officers did not have a bit of *evidence* that the petitioner had committed or was committing a crime before the arrest. The only *evidence* of guilt was provided by the arrest itself.

When the Constitution was up for adoption, objections were made that it contained no Bill of Rights. And Patrick Henry was one who complained in particular that it contained no provision against arbitrary searches and seizures:

> "* * * general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred ***320** may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here than they have in England, because there, if a person be confined, liberty may be quickly obtained by the writ of *habeas corpus.* But here a man living many hundred miles from the judges may get in prison before he can get that writ." I Elliot's Debates, 588.

The determination that arrests and searches on mere suspicion would find no place in American law enforcement did not abate following the adoption of a Bill of Rights applicable to the Federal Government. In Conner v. Commonwealth, 3 Bin., Pa., 38, an arrest warrant issued by a magistrate stating his "strong reason to suspect" that the accused had committed a crime because of "common rumor and report" was held illegal under a constitutional provision identical in relevant part to the Fourth Amendment. "It is true, that by insisting on an oath, felons may sometimes escape. ****337** This must have been very well well known to the framers of court constitution; but they thought it better that the guilty should sometimes escape, than that every individual should be subject ot vexation and oppression." Id., at pages 43-44. In Grumon v. Raymond, 1 Con.. 40, the warrant stated that "several persons are suspected" of stealing some flour which is concealed in Hyatt's house or other places and arrest the suspected persons if found with the flour. The court held the warrant void, stating it knew of "no such process as one to arrest all suspected persons, and bring them before a court for trial. It is an idea not to be endured for a moment." Id., at page 44. See also Fisher v. McGirr, 1 Gray, Mass.,1; Lippman v. People, 175 Ill. 101, 51 N.E. 872; Somerville v. Richards, 37 Mich. 299; Commonwealth v. Dana, 2 Metc., Mass., 329, 335-336.

***321** It was against this long background that Professors Hogan and Snee of Georgetown University recently wrote:

> "* * * it must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by the law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more efficiently, much more economically, and with much more dispatch. It is equally true, however, that society cannot confer such power on the police without ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny." 47 Geo.L.J. 1, 22.

Down to this day our decisions have closely heeded that warning. So far as I can ascertain the mere word of an informer, not bolstered by some evidence[7] that a ***322** crime had been or was being committed, has never been approved by this Court as "reasonable grounds" for making an arrest without a warrant. Whether the act complained of be seizure of goods, search of premises, or the arrest of the citizen, the judicial inquiry has been directed toward the reasonableness of inferences to be drawn from suspicious circumstances attending the action thought to be unlawful. Evidence required to prove guilt is not necessary. But the attendant circumstances must be sufficient to give rise in the mind of the arresting officer at least to inferences of guilt. ****338** Locke v. United States, 7 Cranch 339, 3 L.Ed. 364; The THompson, 3 Wall. 155, 18 L.Ed. 55; Stacey v. Emery, 97 U.S. 642, 24 L.Ed. 1035; Director General of Railroads v. Kastenbaum, 263 U.S. 25, 44 S.Ct. 52, 68 L.Ed. 146; Carroll v. United States, 267 U.S. 132, 159-162, 45 S.Ct. 280,

287-288, 69 L.Ed. 543; United States v. Di Re, 332 U.S. 581, 591-592, 68 S.Ct. 222, 227, 92 L.Ed. 210; Brinegar v. United States,338 U.S. 160, 165-171, 69 S.Ct. 1302, 1305-1308, 93 L.Ed. 1879.

The requirement that the arresting officer know some facts suggestive of guilt has been variously stated:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient." Stacey v. Emery, supra, 97 U.S. at page 645, 24 L.Ed. 1035.

> "* * * good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the * * agent, which in the judgment of the court would make his faith reasonable." Director General of Railroads v. Kastenbaum, supra, 263 U.S. at page 28, 44 S.Ct. at page 53.

***323** Even when officers had information far more suggestive of guilt than the word of the informer used here, we have not sustained arrests without a warrant. In Johnson v. United States, 333 U.S. 10, 16, 68 S.Ct. 367, 92 L.Ed. 436, the arresting officer not only had an informer's tip but he actually smelled opium coming out of a room; and on breaking in found the accused. That arrest was held unlawful. Yet the smell of opium is far more tangible direct evidence than an unverified report that someone is going to commit a crime. And in United States v. Di Re, supra, an arrest without a warrant of a man sitting in a car, where counterfeit coupons had been found passing between two men, was not justified in absence of any shred of evidence implicating the defendant, a third person. And see Giacona v. State, Tex.Cr.App., 298 S.W.2d 587. Yet the evidence before those officers was more potent than the mere word of the informer involved in the present case.

The Court is quite correct in saying that proof of "reasonable grounds" for believing a crime was being committed need not be proof admissible at the trial. It could be inferences from suspicious acts, e.g., consort with known peddlers, the surreptitious passing of a package, an intercepted message suggesting criminal activities, or any number of such events coming to the knowledge of the officer. See People v. Rios, 46 Cal.2d 297, 294 P.2d 39. But, if he takes the law into his own hands and does not seek the protection of a warrant, he must act on some evidence known to him.[8] The law goes far to protect ***324** the citizen. Even suspicious acts observed by the officers may be as consistent with innocence as with guilt. That is not enough, for even the guilty may not be implicated on suspicion alone. Baumboy v. United STates, 9 Cir., 24 F.2d 512. The reason it is, as I have said, that the standard set by the Constitution and by the statutes is one that will protect both the officer and the citizen. For if the officer acts with "probable cause" or "reasonable grounds," he is protected even though the citizen is ****339** innocent.[9] This important requirement should be strictly enforced, lest the whole process of arrest revert once more to whispered accusations by people. When we lower the guards as we do today, we risk making the role of the informer—odious in our history—once more supreme. I think the correct rule was stated in Poldo v. United States, 9 Cir., 55 F.2d 866, 869. "Mere suspicion is not enough; there must be circumstances represented to the officers through the testimony of their senses sufficient to justify them in a good-faith belief that the defendant had violated the law."

Here the officers had no evidence—apart from the mere word of an informer—that petitioner was committing a crime. The fact that petitioner walked fast and carried a tan zipper bag was not evidence of any crime. The officers knew nothing except what they had been told by the informer. If they went to a magistrate to get a warrant of arrest and relied solely on the report of the informer, it is not conceivable to me that one would be granted. See Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1053. For they could not present to the magistrate any of the facts which the informer may have had. They could swear only to the fact that the informer had made the accusation. They could swear to no evidence that lay in their own knowledge. The could ***325** present, on information and belief, no facts which the informer disclosed. No magistrate could issue a warrant on the mere word of an officer, without more.[10] See Giordenello v. United State, supra. We are not justified in lowering the standard when an arrest is made without a warrant and allowing the officers more leeway than we grant the magistrate.

With all deference I think we break with tradition when we sustain this arrest. We said in United States v. Di Re, supra, 332 U.S. at page 229, "* * * a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." In this case it was only after the arrest and search were made that there was a shred of evidence known to the officers that a crime was in the process of being committed.[11]

All Citations

358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327

Footnotes

1 The Fourth Amendment of the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2 Hereford told Marsh that Draper was a Negro of light brown complexion, 27 years of age, 5 feet 8 inches tall, weighed about 160 pounds, and that he was wearing a light colored raincoat, brown slacks and black shoes.

3 The terms "probable cause" as used in the Fourth Amendment and "reasonable grounds" as used in § 104(a) of the Narcotic Control Act, 70 Stat. 570, are substantial equivalents of the same meaning. United States v. Walker, 7 Cir., 246 F.2d 519, 526; cf. United States v. Bianco, 3 Cir., 189 F.2d 716, 720.

4 In the United States v. Heitner, 2 cir., 149 F.2d 105, 106, Judge Learned Hand said: "It is well settled that an arrest may be made upon hearsay evidence; and indeed, the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties."

Grau v. United States, 287 U.S. 124, 128, 53 S.Ct. 38, 40, 77 L.Ed. 212, contains a *dictum* that "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (Giles v. United States, 1 Cir., 284 F. 208; Wagner v. United States, 8 Cir., 8 F. (2d) 581) * * *." But the principles underlying that proposition were thoroughly discredited and rejected in Brinegar v. United States, supra, 338 U.S. at pages 172-174, 69 S.Ct. at pages 1309-1310 and notes 12 and 13. There are several cases in the federal courts that followed the now discredited *dictum* in the Grau case, Simmons v. United States, 8 Cir., 18 F.2d 85, 88; Worthington v. United States, 6 Cir., 166 F.2d 557, 564-565; cf. Reeve v. Howe, D.C., 33 F.Supp. 619, 622; United States v. Novero, D.C., 58 F.Supp. 275, 279, but the great weight of authority is the other way. See, *e.g.,* Wrightson v. United States, 98 U.S.App.D.C. 377, 236 F.2d 672; United States v. Heitner, supra; United States v. Bianco, 3 Cir., 189 F.2d 716; Wisniewski v. United States, 6 Cir., 47 F.2d 825; United States v. Walker, 7 Cir., 246 F.2d 519; Mueller v. Powell, 8 Cir., 203 F.2d 797. And see Note, 46 Harv.L.Rev. 1307, 1310-1311, criticizing the Grau *dictum*.

5 To the same effect are: Husty v. United States, 282 U.S. 694, 700-701, 51 S.Ct. 240, 241-242, 75 L.Ed. 629; Dumbra v. United States, 268 U.S. 435, 441, 45 S.Ct. 546, 548, 69 L.Ed. 1032; Steele v. United States, No. 1, 267 U.S. 498, 504-505, 45 S.Ct. 414, 416-417, 69 L.Ed. 757; Stacey v. Emery, 97 U.S. 642, 645, 24 L.Ed. 1035; Brinegar v. United States, supra, 338 U.S. at pages 175, 176, 69 S.Ct. at pages 1310, 1311.

6 Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652; Carroll v. United States, 267 U.S. 132, 158, 45 S.Ct. 280, 287, 69 L.Ed. 543; Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145; Giordenello v. United States, 357 U.S. 480, 483, 78 S.Ct. 1245, 1248, 2 L.Ed.2d 1503.

1 The Fourth Amendment provides:

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

2 The general warrant was declared illegal by the House of Commons in 1766. See 16 Hansard, Parl.Hist.Eng., 207.

3 The nameless general warrant was not the only vehicle for intruding on the privacy of the subjects without a valid basis for believing them guilty of offenses. In declaring illegal a warrant to search a plaintiff's house for evidence of libel, issued by the Secretary of State without any proof that the named accused was the author of the alleged libels, Lord Camden

said, “we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society.” Entick v. Carrington, 2 Wils.K.B. 275, 291.

4 See Quincy's Mass.Rep., 1761-1882, Appendix I, p. 469.

5 “Experience * * * has taught us that the power [to make arrests, searches and seizures] is one open to abuse. The most notable historical instance of it is that of lettres de cachet. Our Constitution was framed during the seethings of the French Revolution. The thought was to make lettres de cachet impossible with us.” United States v. Innelli, D.C., 286 F. 731.

6 See also Maryland Declaration of Rights (1776), Art. XXIII; Massachusetts Constitution (1780), Part First, Art. XIV; New Hampshire Constitution (1784), Part I, Art. XIX; North Carolina Declaration of Rights (1776), Art. XI; Pennsylvania Constitution (1776), Art. X.

7 Hale, who traced the evolution of arrests without warrants in The History of the Pleas of the Crown (1st Am. ed. 1847), states that while officers need at time to act on information from others, they must make that information, so far as they can, their own. He puts a case where A, suspecting B “on reasonable grounds” of being a felon, asks an officer to arrest B. The duty of the officer was stated as follows:

> “He ought to inquire and examine the circumstances and causes of the suspicion of A which tho he cannot do it upon oath, yet such an information may carry over the suspicion even to the constable, whereby it may become his suspicion as well as the suspicion of A.” Id., at 91.

8 United States v. Heitner, 2 Cir., 149 F.2d 105, 106, that says an arrest may be made “upon hearsay evidence” was a case where the arrest was made after the defendant on seeing the officers tried to get away. Our cases cited by that court in support of the use of hearsay were Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; Dumbra v. United States, 268 U.S. 435, 45 S.Ct. 546, 69 L.Ed 1032; and Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629. But each of them was a case where the information on which the arrest was made, though perhaps not competent at the trial, was known to the arresting officer.

9 Maghan v. Jerome, 67 App.D.C. 9, 88 F.2d 1001; Pritchett v. Sullivan, 8 Cir., 182 F. 480. See Ravenscroft v. Casey, 2 Cir., 139 F.2d 776.

10 See State v. Gleason, 32 Kan. 245, 4 P. 363; State v. Smith, Mo.App., 262 S.W. 65, arising under state constitutions having provisions comparable to our Fourth Amendment.

11 The Supreme Court of South Carolina has said:

> “Some things are to be more deplored than the unlawful transportation of whiskey; one is the loss of liberty. Common as the event may be, it is a serious thing to arrest a citizen, and it is a more serious thing to search his person; and he who accomplishes it, must do so in conformity to the laws of the land. There are two reasons for this; one to avoid bloodshed, and the other to preserve the liberty of the citizen. Obedience to law is the bond of society, and the officers set to enforce the law are not exempt from its mandates.
>
> “In the instant case of possession of the liquor was the body of the offense; that fact was proven by a forcible and unlawful search of the defendant's person to secure the veritable key to the offense. It is fundamental that a citizen may not be arrested and have his person searched by force and without process in order to secure testimony against him. * * * It is better that the guilty shall escape, rather than another offense shall be committed in the proof of guilt.” Town of Blacksburg v. Beam, 104 S.C. 146, 148, 88 S.E. 441, L.R.A. 1916E, 714.

87 S.Ct. 1056
Supreme Court of the United States

George McCRAY, Petitioner,

v.

STATE OF ILLINOIS.

No. 159.
|
Argued Jan. 10 and 11, 1967.
|
Decided March 20, 1967.
|
Rehearing Denied May 8, 1967.

See 386 U.S. 1042, 87 S.Ct. 1474.

Synopsis

Defendant's conviction before the Circuit Court of Cook County, Illinois, for unlawful possession of narcotics was affirmed by the Illinois Supreme Court, 33 Ill.2d 66, 210 N.E.2d 161, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that fact that Illinois court, following settled Illinois law, refused to compel police officers, at preliminary hearing to determine probable cause for arrest and search of defendant, to divulge identity of informant who had informed officers that defendant was selling narcotics and had narcotics on his person was not violative of due process clause or defendant's constitutional right to confrontation.

Affirmed.

Mr. Justice Douglas, Mr. Chief Justice Warren, Mr. Justice Brennan and Mr. Justice Fortas dissented.

Attorneys and Law Firms

****1057** ***301** R. Eugene Pincham, Chicago, Ill., for petitioner.

John J. O'Toole, Chicago, Ill., for respondent.

Opinion

Mr. Justice STEWART delivered the opinion of the Court.

The petitioner was arrested in Chicago, Illinois, on the morning of January 16, 1964, for possession of narcotics. The Chicago police officers who made the arrest found a package containing heroin on his person and he was indicted for its unlawful possession. Prior to trial he filed a motion to suppress the heroin as evidence against him, claiming that the police had acquired it in an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081. After a hearing, the court denied the motion, and the petitioner was subsequently convicted upon the evidence of the heroin the arresting officers had found in his possession. The judgment of conviction was affirmed by the Supreme Court of Illinois,[1] and we granted certiorari to consider the petitioner's claim that the hearing on his motion to suppress was constitutionally defective.[2]

The petitioner's arrest occurred near the intersection of 49th Street and Calumet Avenue at about seven in the morning. At the hearing on the motion to suppress, he testified that up until a half hour before he was arrested he had been at 'a friend's house' about a block away, ***302** that after leaving the friend's house he had 'walked with a lady from 48th to 48th and South Park,' and that, as he approached 49th Street and Calumet Avenue, '(t)he Officers stopped me going through the alley.' 'The officers,' he said, 'did not show me a search warrant for my person or an arrest warrant for my arrest.' He said the officers then searched him and found the narcotics in ****1058** question.[3] The petitioner did not identify the 'friend' or the 'lady,' and neither of them appeared as a witness.

The arresting officers then testified. Officer Jackson stated that he and two fellow officers had had a conversation with an informant on the morning of January 16 in their unmarked police car. The officer said that the informant had told them that the petitioner, with whom Jackson was acquainted, 'was selling narcotics and had narcotics on his person and that he could be found in the vicinity of 47th and Calumet at this particular time.' Jackson said that he and his fellow officers drove to that vicinity in the police car and that when they spotted the petitioner, the informant pointed him out and then departed on foot. Jackson stated that the officers observed the petitioner walking with a woman, then separating from her and meeting briefly with a man, then proceeding alone, and finally, after seeing the police car, 'hurriedly walk(ing) between two buildings.' 'At this point,' Jackson testified, 'my partner and myself got out of the car and informed him we had information he had narcotics on his person, placed him in the

police vehicle at this point.' Jackson stated that the officers then searched ***303** the petitioner and found the heroin in a cigarette package.

Jackson testified that he had been acquainted with the informant for approximately a year, that during this period the informant had supplied him with information about narcotics activities 'fifteen, sixteen times at least,' that the information had proved to be accurate and had resulted in numerous arrests and convictions. On cross-examination, Jackson was even more specific as to the informant's previous reliability, giving the names of people who had been convicted of narcotics violations as the result of information the informant had supplied. When Jackson was asked for the informant's name and address, counsel for the State objected, and the objection was sustained by the court.[4]

Officer Arnold gave substantially the same account of the circumstances of the petitioner's arrest and search, stating that the informant had told the officers that the petitioner 'was selling narcotics and had narcotics on his ***304** person now in the vicinity of 47th and Calumet.' The informant, Arnold testified, 'said he had observed (the petitioner) selling narcotics ****1059** to various people, meaning various addicts, in the area of 47th and Calumet.' Arnold testified that he had known the informant 'roughly two years,' that the informant had given him information concerning narcotics '20 or 25 times,' and that the information had resulted in convictions. Arnold too was asked on cross-examination for the informant's name and address, and objections to these questions were sustained by the court.

There can be no doubt, upon the basis of the circumstances related by Officers Jackson and Arnold, that there was probable cause to sustain the arrest and incidental search in this case. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327. Unlike the situation in Beck v. State of Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142, each of the officers in this case described with specificity 'what the informer actually said, and why the officer thought the information was credible.' 379 U.S., at 97, 85 S.Ct., at 229. The testimony of each of the officers informed the court of the 'underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was 'credible' or his information 'reliable.'' Aguilar v. State of Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723. See United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684. Upon the basis of those circumstances, along with the officers' personal observations of the petitioner, the court was fully justified in holding that at the time the officers made the arrest 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. Brinegar v. United States, 338 U.S. 160, 175—176, 69 S.Ct. 1302, 1310—1311, 93 L.Ed. 1879; Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134,' ***305** Beck v. State of Ohio, supra, 379 U.S. at 91, 85 S.Ct. at 225. It is the petitioner's claim, however, that even though the officers' sworn testimony fully supported a finding of probable cause for the arrest and search, the state court nonetheless violated the Constitution when it sustained objections to the petitioner's questions as to the identity of the informant. We cannot agree.

In permitting the officers to withhold the informant's identity, the court was following well-settled Illinois law. When the issue is not guilt or innocence, but, as here, the question of probable cause for an arrest or search, the Illinois Supreme Court has held that police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant.[5] This Illinois evidentiary rule is consistent with the law of many other States.[6] In California, the State Legislature in 1965 enacted a statute adopting just such a rule for cases like the one before us:

'(I)n any preliminary hearing, criminal trial, or other criminal proceeding, ****1060** for violation of any provision of Division 10 (commencing with Section 11000) of the Health and Safety Code, evidence of information ***306** communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, shall be admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure.' California Evid.Code s 1042(c).[7]

The reasoning of the Supreme Court of New Jersey in judicially adopting the same basic evidentiary rule was

instructively expressed by Chief Justice Weintraub in State v. Burnett, 42 N.J. 377, 201 A.2d 39:

'If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the routine demand would have to be routinely granted. The result would be that the State could use the informant's information only as ***307** a lead and could search only if it could gather adequate evidence of probable cause apart from the informant's data. Perhaps that approach would sharpen investigatorial techniques, but we doubt that there would be enough talent and time to cope with crime upon that basis. Rather we accept the premise that the informer is a vital part of society's defensive arsenal. The basic rule protecting his identity rests upon that belief.

'We must remember also that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege. Here, however, the accused seeks to avoid the truth. The very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand, not because its probative force is diluted in the least by the mode of seizure, but rather as a sanction to compel enforcement officers to respect the constitutional security of all of us under the Fourth Amendment. State v. Smith, 37 N.J. 481, 486, 181 A.2d 761 (1962). If the motion to suppress is denied, defendant will still be judged upon the untarnished truth.

'The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may ****1061** require that the ***308** informant be identified or even produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that it should rest entirely with the judge who hears the motion to suppress to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness.' 42 N.J., at 385—388, 201 A.2d, at 43—45.

What Illinois and her sister States have done is no more than recognize a well-established testimonial privilege, long familiar to the law of evidence. Professor Wigmore, not known as an enthusiastic advocate of testimonial privileges generally,[8] has described that privilege in these words:

'A genuine privilege, on * * * fundamental principle * * *, must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness ***309** to the government and discourages others from entering into a like relationship.

'That the government has this privilege is well established, and its soundness cannot be questioned.' (Footnotes omitted.) 8 Wigmore, Evidence s 2374 (McNaughton rev. 1961).

In the federal courts the rules of evidence in criminal trials are governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'[9] This Court, therefore, has the ultimate task of defining the scope to be accorded to the various common law evidentiary privileges in the trial of federal criminal cases. See Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125. This is a task which is quite different, of course, from the responsibility of constitutional adjudication. In the exercise of this supervisory jurisdiction the Court had occasion 10 years ago, in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, to give thorough consideration to one aspect of the informer's privilege, the privilege itself having long been recognized in the federal judicial system.[10]

The Roviaro case involved the informer's privilege, not at a preliminary hearing to determine probable cause for an arrest or search, but at the trial itself where the issue was the fundamental one of innocence or guilt. The petitioner there had been brought to trial upon a two-court federal indictment charging sale and transportation of narcotics. According to the prosecution's evidence, the informer had been an active participant in the crime. He 'had taken a material part in bringing about the possession of certain drugs by the accused, had been **1062 present with the accused at the occurrence of *310 the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged.' 353 U.S., at 55, 77 S.Ct., at 625. The trial court nonetheless denied a defense motion to compel the prosecution to disclose the informer's identity.

This Court held that where, in an actual trial of a federal criminal case,
'the disclosure of an informer's identity * * * is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. * * *

'We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.' 353 U.S., at 60—61, 62, 77 S.Ct., at 628. (Footnotes omitted.)

The Court's opinion then carefully reviewed the particular circumstances of Roviaro's trial, pointing out that the informer's 'possible testimony was highly relevant * * *,' that he 'might have disclosed an entrapment * * *,' 'might have thrown doubt upon petitioner's identity or on the identity of the package * * *,' 'might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' * * *,' and that the 'informer was the sole participant, other *311 than the accused, in the transaction charged.' 353 U.S., at 63—64, 77 S.Ct., at 629—630. The Court concluded 'that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure.' 353 U.S., at 65, 77 S.Ct, at 630.

What Roviaro thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. Much less has the Court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake. Indeed, we have repeatedly made clear that federal officers need not disclose an informer's identity in applying for an arrest or search warrant. As was said in United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 745, 13 L.Ed.2d 684, we have 'recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved 'whose identity need not be disclosed * * * was 'credible' or his information 'reliable.'' Aguilar v. State of Texas, supra, 378 U.S., at 114, 84 S.Ct., at 1514.' (Emphasis added.) See also Jones v. United States, 362 U.S. 257, 271—272, 80 S.Ct. 725, 736—737, 4 L.Ed.2d 697; Rugendorf v. United States, 376 U.S. 528, 533, 84 S.Ct. 825, 828, 11 L.Ed.2d 887.[11] And *312 just **1063 this Term we have taken occasion to point out that a rule virtually prohibiting the use of informers would 'severely hamper the Government' in enforcement of the narcotics laws. Lewis v. United States, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312.

In sum, the Court in the exercise of its power to formulate evidentiary rules for federal criminal cases has consistently declined to hold that an informer's identity need always be disclosed in a federal criminal trial, let alone in a preliminary hearing to determine probable cause for an arrest or search. Yet we are now asked to hold that the Constitution somehow compels Illinois to abolish the informer's privilege from its law of evidence, and to require disclosure of the informer's identity in every such preliminary hearing where it appears that the officers made the arrest or search in reliance upon facts supplied by an informer they had reason to trust. The argument is based upon the Due *313 Process Clause of the Fourteenth Amendment, and upon the Sixth Amendment right of confrontation, applicable to the States through the Fourteenth Amendment. Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. We find no support

for the petitioner's position in either of those constitutional provisions.

The arresting officers in this case testified, in open court, fully and in precise detail as to what the informer told them and as to why they had reason to believe his information was trustworthy. Each officer was under oath. Each was subjected to searching cross-examination. The judge was obviously satisfied that each was telling the truth, and for that reason he exercised the discretion conferred upon him by the established law of Illinois to respect the informer's privilege.

Nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury. 'To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence * * * in their own state courts * * *.' Spencer v. State of Texas, 385 U.S. 554, 568—569, 87 S.Ct. 648, 656, 17 L.Ed.2d 606.

**1064 The petitioner does not explain precisely how he thinks his Sixth Amendment right to confrontation and cross-examination was violated by Illinois' recognition of the informer's privilege in this case. If the claim is that the State violated the Sixth Amendment by not producing the informer to testify against the petitioner, then we need no more than repeat the Court's answer to that claim a few weeks ago in Cooper v. State of California:

'Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State *314 did not produce the informant to testify against him. This contention we consider absolutely devoid of merit.' 386 U.S. 58, at 62, n. 2, 87 S.Ct. 788, at 791, 17 L.Ed.2d 730.

On the other hand, the claim may be that the petitioner was deprived of his Sixth Amendment right to cross-examine the arresting officers themselves, because their refusal to reveal the informer's identity was upheld. But it would follow from this argument that no witness on cross-examination could ever constitutionally assert a testimonial privilege, including the privilege against compulsory self-incrimination guaranteed by the Constitution itself. We have never given the Sixth Amendment such a construction, and we decline to do so now.

Affirmed.

Mr. Justice DOUGLAS, with whom THE CHIEF JUSTICE, Mr. Justice BRENNAN and Mr. Justice FORTAS concur, dissenting.

We have here a Fourth Amendment question concerning the validity of an arrest. If the police see a crime being committed they can of course seize the culprit. If a person is fleeing the scene of a crime, the police can stop him. And there are the cases of 'hot pursuit' and other instances of probable cause when the police can make an arrest. But normally an arrest should be made only on a warrant issued by a magistrate on a showing of 'probable cause, supported by Oath or affirmation,' as required by the Fourth Amendment. At least since Mapp. v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, the States are as much bound by those provisions as is the Federal Government. But for the Fourth Amendment they could fashion the rule for arrests that the Court now approves. With all deference, the requirements of the Fourth Amendment now make that conclusion unconstitutional.

No warrant for the arrest of petitioner was obtained in this case. The police, instead of going to a magistrate *315 and making a showing of 'probable cause' based on their informant's tip-off, acted on their own. They, rather than the magistrate, became the arbiters of 'probable cause.' The Court's approval of that process effectively rewrites the Fourth Amendment.

In Roviaro v. United States, 353 U.S. 53, 61, 77 S.Ct. 623, 628, 1 L.Ed.2d 639, we held that where a search without a warrant is made on the basis of communications of an informer and the Government claims the police had 'probable cause,' disclosure of the identity of the informant is normally required. In no other way can the defense show an absence of 'probable cause.' By reason of Mapp v. Ohio, supra, that rule is now applicable to the States.

In Beck v. State of Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142, we said:

'An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.'

**1065 For that reason we have weighted arrests with warrants more heavily than arrests without warrants. See

United States v. Ventresca, 380 U.S. 102, 106, 85 S.Ct. 741, 744, 13 L.Ed.2d 684. Only through the informer's testimony can anyone other than the arresting officers determine 'the persuasiveness of the facts relied on * * * to show probable cause.' Aguilar v. State of Texas, 378 U.S. 108, 113, 84 S.Ct. 1509, 1513, 12 L.Ed.2d 723.[1] Without that disclosure neither we nor the lower courts can ever know whether there was 'probable cause' for the arrest. Under the present decision we leave the Fourth Amendment exclusively in the custody of the police. As stated by Mr. Justice Schaefer dissenting in People v. Durr, 28 Ill.2d 308, 318, 192 N.E.2d 379, 384, unless the identity of the informer is disclosed 'the policeman himself conclusively ***316** determines the validity of his own arrest.' That was the view of the Supreme Court of California in Priestly v. Superior Court, 50 Cal.2d 812, 818, 330 P.2d 39, 43:

'Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue. Such a requirement does not unreasonably discourage the free flow of information to law enforcement officers or otherwise impede law enforcement. Actually its effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search.'

There is no way to determine the reliability of Old Reliable, the informer, unless he produced, at the trial and cross-examined. Unless he is produced, the Fourth Amendment is entrusted to the tender mercies of the police.[2] What we do today is to encourage arrests and searches without warrants. The whole momentum of criminal law administration should be in precisely the opposite direction, if the Fourth Amendment is to remain a vital force. Except in rare and emergency cases, it requires magistrates to make the findings of 'probable cause.' We should be mindful of its command that a judicial mind should be interposed between the police and the citizen. We should also be mindful that 'disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.' Dennis v. United States, 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973.

All Citations

386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62

Footnotes

1 33 Ill.2d 66, 210 N.E.2d 161.

2 384 U.S. 949, 86 S.Ct. 1575, 16 L.Ed.2d 546.

3 The weather was 'real cold,' and the petitioner testified he 'had on three coats.' In order to conduct the search, the arresting officers required the petitioner to remove some of his clothing, but even the petitioner's version of the circumstances of the search did not disclose any conduct remotely akin to that condemned by this Court in Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183.

4 'Q. What is the name of this informant that gave you this information?

'Mr. Engerman: Objection, Your Honor.

'The Court: State for the record the reasons for your objection.

'Mr. Engerman: Judge, based upon the testimony of the officer so far that they had used this informant for approximately a year, he has worked with this individual, in the interest of the public, I see no reason why the officer should be forced to disclose the name of the informant, to cause harm or jeopardy to an individual who has cooperated with the police. The City of Chicago have a tremendous problem with narcotics. If the police are not able to withhold the name of the informant they will not be able to get informants. They are not willing to risk their lives if their names become known.

'In the interest of the City and the law enforcement of this community, I feel the officer should not be forced to reveal the name of the informant. And I also cite People vs. Durr.

'The Court: I will sustain that.

'Mr. Adam: Q. Where does this informant live?

'Mr. Engerman: Objection, your Honor, same basis.

'The Court: Sustained.'

5 People v. Durr, 28 Ill.2d 308, 192 L.E.2d 379; People v. Nettles, 34 Ill.2d 52, 213 N.E.2d 536; People v. Connie, 34 Ill.2d 353, 215 N.E.2d 280; People v. Freeman, 34 Ill.2d 362, 215 N.E.2d 206; People v. Miller, 34 Ill.2d 527, 216 N.E.2d 793. Cf. People v. Pitts, 26 Ill.2d 395, 186 N.E.2d 357; People v. Parren, 24 Ill.2d 572, 182 N.E.2d 662.

6 State v. Cookson, 361 S.W.2d 683 (Mo.Sup.Ct.); Simmons v. State, 198 Tenn. 587, 281 S.W.2d 487; People v. Coffey, 12 N.Y.2d 443, 240 N.Y.S.2d 721, 191 N.E.2d 263. But see People v. Malinsky, 15 N.Y.2d 86, 262 N.Y.S.2d 65, 209 N.E.2d 694. Cf. Stelloh v. Liban, 21 Wis.2d 119, 124 N.W.2d 101; Baker v. State, 150 So.2d 729 (Fla.App.); State v. Boles, 246 N.C. 83, 97 S.E.2d 476.

7 In the present case California has filed a helpful amicus brief, advising us that the validity of this provision is now before the Supreme Court of California. Martin v. Superior Court, (LA 29078). The statute was enacted to modify that court's decision in Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39. See also Ford v. City of Jackson, 153 Miss. 616, 121 So. 278.

8 See 8 Wigmore, Evidence s 2192 (McNaughton rev. 1961).

9 Rule 26, Fed.Rules Crim.Proc.

10 See Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151; In re Quarles & Butler, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080; Vogel v. Gruaz, 110 U.S. 311, 4 S.Ct. 12, 28 L.Ed. 158.

11 Some federal courts have applied the same rule of nondisclosure in both warrant and nonwarrant cases. Smith v. United States, 123 U.S.App.D.C. 202, 358 F.2d 833; Jones v. United States, 326 F.2d 124 (C.A.9th Cir.), cert. denied, 377 U.S. 956, 84 S.Ct. 1635, 12 L.Ed.2d 499; United States v. One 1957 Ford Ranchero Pickup, 265 F.2d 21 (C.A.10th Cir.). Other federal courts, however, have distinguished between these two classes of cases and have required the identification of informants in nonwarrant cases. United States v. Robinson, 325 F.2d 391 (C.A.2d Cir.); Cochran v. United States, 291 F.2d 633 (C.A.8th Cir.). Cf. Wilson v. United States, 59 F.2d 390 (C.A.3d Cir.). See Comment, Informer's Word as the Basis for Probable Cause in the Federal Courts, 53 Calif.L.Rev. 840 (1965).

In drawing this distinction some of the federal courts have relied upon a dictum in Roviaro v. United States, 353 U.S. 53, 61, 77 S.Ct. 623, 628, 1 L.Ed.2d 639:

'Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.'

Since there was no probable cause issue in Roviaro, the quoted statement was clearly not necessary for decision. Indeed, an absolute rule of disclosure for probable cause determinations would conflict with the case-by-case approach upon which the Roviaro decision was based. Moreover, the precedent upon which this dictum was grounded furnishes only dubious support. Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151, the only decision of this Court which was cited, affirmed the trial judge's refusal to order arresting officers to reveal the source of their information.

1 Quoting from Giordenello v. United States, 357 U.S. 486, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503.

2 It is not unknown for the arresting officer to misrepresent his connection with the informer, his knowledge of the informer's reliability, or the information allegedly obtained from the informer. See, e.g., United States v. Pearce, 7 Cir., 275 F.2d 318, 322.

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16 Ill.App.3d 440
Appellate Court of Illinois, First District, Second Division.

PEOPLE of the State of
Illinois, Plaintiff-Appellee,
v.
Ernestine WILLIAMS, Defendant-Appellant.

Nos. 57345, 57848.
|
Dec. 11, 1973.

Synopsis

Defendant was convicted in Circuit Court, Cook County, Marvin E. Aspen, J., of possession of heroin and she appealed. The Appellate Court, Leighton, J., held that where defendant made a prima facie case that officer lacked probable cause to make the arrest, the burden of going forward shifted to the state; that testimony by arresting officer that he did not have an arrest warrant and had not seen defendant violate any law established a prima facie case that there was no probable cause; and that testimony by arresting officer concerning the reliability of informer who told him that defendant would be in possession of heroin was so inconsistent and uncertain as to demonstrate a lack of proof as to the alleged informer's reliability and even his existence and did not establish probable cause for the arrest.

Reversed and remanded with directions.

Attorneys and Law Firms

***441** ****679** Sam Adam, Edward M. Genson, Arnette R. Hubbard, Chicago, for defendant-appellant.

Bernard Carey, State's Atty., Chicago, for plaintiff-appellee; Kenneth L. Gillis, Asst. State's Atty., of counsel.

Opinion

LEIGHTON, Justice:

A one-count indictment charged the defendant, Ernestine Williams, with unlawful possession of heroin. She waived trial by jury, was convicted and sentenced to serve one to two years. Prior to her trial, defendant filed a motion to suppress evidence which she alleged was illegally seized at the time of her arrest.

I.

In support of the motion, she called Robert Smith, a Chicago police officer who testified that at approximately 9:00 P.M. on March 25, 1971, he arrested defendant while she was walking south, near 1358 South Ashland Avenue, Chicago. Smith testified that he had neither a warrant for defendant's arrest nor one that authorized the search of her person. He conceded that before he arrested defendant, he did not see her violate any law. Nonetheless, he took defendant into custody, and she was transported to the 12th District Vice Office of the Chicago Police Department. Smith testified that in the police station, he searched her coat and found '* * * a quantity of white powder.' At the end of his direct examination, Smith's police report of defendant's arrest was given to her counsel. Thereafter, Smith was cross-examined.

Smith was asked whether at about 5:30 P.M. on the 25th of March 1971 he received a telephone call at the 12th District Police Station in Chicago. He said he did; that he recognized the voice because for '* * * approximately a year, I would say,' he had known the individual who called him; and that during the year, he had talked with this individual about ten times. On a number of occasions, '* * * I would say maybe ten or more,' he had met this individual and had received information from him concerning narcotics, 'I would say approximately four times.' He acted on the information he received and recovered narcotics ***442** in every instance. He made four arrests, two of which resulted in convictions '* * * and two pending that was approximately a year ago (sic).' In addition to matters concerning narcotics, this individual gave information about gambling which led to the recovery of a quantity of gambling slips '* * * a form of gambling that comes out in Puerto Rican papers every Wednesday, they take a collection, it is pretty hard to explain.'

In answer to further questions, Smith testified that in the telephone conversation of March 25, the individual who called told him that he and several addicts were waiting for defendant to come with some heroin to the poolroom of a tavern at 1358 South Ashland Avenue; and that defendant arrived at the tavern every night, at approximately 6:00 P.M. The individual said that defendant * * * was on her ****680** way'; and that on the 24th of March, the evening before, at approximately 8:00 P.M., he (the individual) had purchased three capsules of heroin from defendant for $9. Based on this information, Smith said he and his fellow officers proceeded directly to the location described to him. He knew the defendant '* * * from prior arrests.' When

he was asked the number of prior arrests through which he knew defendant, Smith replied, 'One arrest.' Then, he was subjected to redirect examination by defendant's counsel.

Smith was asked if he could name the two persons whose narcotics convictions resulted from information given him by the individual who called him the evening of March 25, 1971. He answered, 'I don't recall the names right now.' He was asked if he could name the two whose cases he said were pending on March 25, 1971. He answered, 'I don't recall.' When he was asked if he could name the person who was arrested on the gambling charge, he gave a phonetic spelling, saying, 'I could be wrong on the spelling.' As to when the arrest took place, Smith responded, 'I don't recall the time.' When asked how long before the 25th of March, 1971 the arrest had been made, his response was, 'I don't recall at this time.' Smith was dismissed. No other witness was called; no other evidence was introduced. The trial court denied the motion to suppress.

From these facts, defendant presents two issues. 1. Whether the trial court erred in denying defendant's motion to suppress evidence. 2. Whether the sentence imposed posed by the trial court is excessive.

II.

In a proceeding to suppress evidence, the burden of proving that the search and seizure were unlawful is on the defendant. (Ill.Rev.Stat.1969, ch. 38, par. 114—12(b).) However, the burden of proving ***443** the validity of an arrest is shifted to the state when a defendant shows he was doing nothing unusual at the time of his arrest, and he makes a prima facie case that the police lacked probable cause to arrest him. In such event, the burden of going forward with evidence to negate lack of probable cause shifts to the state. People v. Moncrief, 131 Ill.App.2d 770, 268 N.E.2d 717.

In this case, defendant called as her witness Robert Smith, the officer who arrested her. She proved by his testimony that she was doing nothing unusual, nor was she violating any law when he arrested her. Thus, she made a prima facie case that the officer lacked probable cause to make the arrest. (People v. King, 12 Ill.App.3d 355, 298 N.E.2d 715.) Therefore, the burden of going forward with evidence shifted to the State. (People v. Cassell, 101 Ill.App.2d 279, 243 N.E.2d 363.) However, the State did not call a witness, or introduce any evidence, but cross-examined Smith in order to prove that, in fact, there was probable cause for defendant's arrest. Smith proceeded to testify to information which he purportedly received from an informer, and to the reliability of the informer. Smith testified that he arrested defendant because an unidentified individual called about 5:30 P.M. on the 25th of March, 1971, and told him that defendant was expected in a tavern on South Ashland Avenue with heroin. The reliability of this informer was based on Smith's statement that on four occasions narcotics information from the individual had produced four arrests that resulted in two convictions and two pending cases. In addition, Smith said that this individual had furnished him information that led to a gambling raid.

Smith's testimony was weakened by the fact that he arrested defendant at approximately 9:00 P.M., not 6:00 P.M., the hour allegedly given him by the informer as defendant's arrival time at the tavern. Moreover, the written report he made of defendant's arrest contained a narrative, apparently in his handwriting, that differed from his testimony. It stated that defendant was arrested in a narcotic raid in front of 1358 South Ashland Avenue ****681** (Smith had testified that he arrested defendant as she was walking south on Ashland Avenue). The report stated that defendant was found in possession of a brown bottle containing seventy-five pink capsules of white powder (Smith had testified that in the police station he found a quantity of white powder in defendant's coat pocket). Although Smith testified that he arrested defendant on reliable information, he could not recall the names of the persons who had been convicted nor of the two whose cases he said were pending on March 25, 1971. There was inconsistency in Smith's testimony concerning the period of time he had known the allegedly reliable informer and the period of time within which he obtained information from him. Although ***444** he had two partners with whom he worked in narcotics cases, he alone claimed to know the identity of the informer. Three other policemen, according to Smith, were involved in defendant's arrest; yet, his cross-examination testimony is the State's only evidence in support of the claim that a reliable informer's tip was the ground for defendant's arrest.

In the hearing of a motion to suppress evidence, the State must show the grounds for the arresting officer's belief, including facts relating to the credibility of an informer, where information from an informer is the basis of that belief. (Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; People v. McCray, 33 Ill.2d 66, 210 N.E.2d 161.) Probable cause for an arrest may be based on information from an informer, if reliability of that informer has been previously established, People v. Durr, 28 Ill.2d 308, 192

N.E.2d 379; or has been independently corroborated, People v. McFadden, 32 Ill.2d 101, 203 N.E.2d 888.

It is our judgment that Smith's cross-examination testimony did not discharge the State's burden of proof concerning the informer. In fact, Smith's testimony was inconsistent and uncertain; it demonstrated a woeful lack of proof, not only as to the alleged informer's reliability but even as to his existence. From a leading case, we are reminded of the statement made by our Supreme Court that an '* * * informer's past reliability should not be left to inference, when it is such an easy matter to show the accuracy of the previous tips.' People v. McClellan, 34 Ill.2d 572, 574, 218 N.E.2d 97, 98.

For these reasons, we conclude that the trial court erred in denying defendant's motion to suppress the evidence she alleged was illegally seized at the time of her arrest. (People v. Mason, 1 Ill.App.3d 302, 274 N.E.2d 216; compare People v. Young, 4 Ill.App.3d 602, 279 N.E.2d 392.) Having reached this conclusion, we will not decide whether the sentence imposed by the trial court is excessive. The judgment is reversed and the cause is remanded with directions that the trial court enter an order sustaining defendant's motion to suppress; and for further proceedings, not inconsistent with the views expressed in this opinion.

Reversed and remanded with directions.

STAMOS, P.J., and HAYES, J., concur.

All Citations

16 Ill.App.3d 440, 306 N.E.2d 678

105 N.J. 95
Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff-Appellant,
v.
Ottavio NOVEMBRINO,
Defendant-Respondent.

Argued Feb. 19, 1986.
|
Decided Jan. 7, 1987.

Synopsis

SYNOPSIS

Defendant charged with possession of certain controlled substances and possession with intent to distribute moved to suppress evidence seized in nonconsensual search. After remand, the Superior Court, Law Division, Hudson County, entered order suppressing evidence for failure of affidavit relied upon for issuance of search warrant to establish probable cause, and State appealed. The Superior Court, Appellate Division, 200 N.J.Super. 229, 491 A.2d 37, affirmed and State moved for leave to appeal. The Supreme Court, Stein, J., held that exclusionary rule, unmodified by good-faith exception, is integral element of state constitutional guarantee that search warrants will not issue without probable cause.

Affirmed.

Handler, J., concurred and filed opinion.

Garibaldi, J., concurred in part and dissented in part and filed opinion.

Attorneys and Law Firms

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Jeffrey E. Fogel, Executive Director, Newark, submitted a brief on behalf of amicus curiae American Civil Liberties Union of New Jersey.

Joseph A. Hayden, Jr., Hoboken, submitted a brief on behalf of amicus curiae Ass'n Criminal Defense Lawyers of New Jersey ***99** (Joseph A. Hayden, Jr., Hoboken, attorney; Harvey Weissbard, West Orange, and Judith Margulies Katz, Jersey City, on the brief).

Opinion

The opinion of the Court was delivered by

STEIN, J.

Since 1961, when the United States Supreme Court decided *Mapp v. Ohio,* 367 ****822** *U.S.* 643, 81 *S.Ct.* 1684, 6 *L.Ed.*2d 1081, New Jersey and her sister states have been compelled by the federal constitution to exclude from the State's case-in-chief evidence obtained in violation of the fourth amendment. The so-called "exclusionary rule" has been applied in federal criminal cases since 1914 when the rule was first adopted to protect the rights secured by the fourth amendment.[1] *Weeks v. United States,* 232 *U.S.* 383, 34 *S.Ct.* 341, 58 *L.Ed.* 652. Justice Day, writing for a unanimous Court, observed that without an exclusionary rule "the 4th Amendment * * * is of no value, and * * * might as well be stricken from the Constitution." *Id.* at 393, 34 *S.Ct.* at 344, 58 *L.Ed.* at 656.

For the first time since the *Weeks* decision, the Court in 1984 modified the exclusionary rule's application to the government's case-in-chief. In *United States v. Leon,* 468 *U.S.* 897, 104 *S.Ct.* 3405, 82 *L.Ed.*2d 677, the Court held that evidence seized pursuant to a warrant issued without probable cause need not be excluded if the police officer who executed the warrant, judged by the objective standard of a reasonably well-trained police officer, relied in good faith on the defective warrant in gathering the evidence. In this case, we are asked by the Attorney General and the Hudson County Prosecutor to decide if article I, paragraph 7 of the New Jersey Constitution, which ***100** incorporates almost verbatim the protection against unreasonable searches and seizures set

forth in the fourth amendment, will tolerate a modification of the exclusionary rule that recognizes the good-faith exception established by the United States Supreme Court in *Leon.*

We approach the issue posed here mindful of the controversy that has engulfed the exclusionary rule since its inception.[2] As Justice Blackmun acknowledged in *United States v. Janis,* 428 *U.S.* 433, 446, 96 *S.Ct.* 3021, 3028, 49 *L.Ed.*2d 1046, 1056 (1976), "The debate within the Court on the exclusionary rule has always been a warm one."

Characteristic of the sharp criticism the exclusionary rule has provoked are the observations of Chief Justice Burger, dissenting in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 *U.S.* 388, 419–20, 91 *S.Ct.* 1999, 2016–17, 29 *L.Ed.*2d 619, 640 (1971):

> I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition. Yet for over 55 years, and with increasing scope and intensity * * * our legal system has treated vastly dissimilar cases as if they were the same. Our adherence to the exclusionary rule, our resistance to change, and our refusal even to acknowledge the need for effective enforcement mechanisms bring to mind Holmes' well-known statement:
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> > "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv L Rev 457, 469 (1897).
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> In characterizing the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement, I intend no reflection on the motivation of those members of this Court who hoped it would be a means of ****823** enforcing the Fourth Amendment. Judges cannot be faulted for being offended by arrests, searches, and seizures that violate the Bill of Rights or statutes intended to regulate public officials. But we can and should be faulted for clinging to an unworkable and irrational concept of law.

***101** In sharp contrast is the perception of the exclusionary rule articulated by Justice Clark in *Mapp v. Ohio, supra:*

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." *People v. Defore,* 242 NY [13], at 21, 150 NE [585], at 587 [1926]. In some cases this will undoubtedly be the result. But, as was said in *Elkins,* "there is another consideration—the imperative of judicial integrity." [*Elkins v. U.S.*] 364 US [206], at 222 [80 *S.Ct.* 1437, at 1447, 4 *L.Ed.*2d 1669 (1960)]. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v United States,* 277 US 438, 485, 72 L.Ed. 944, 959, 48 SCt 564, 66 ALR 376 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."
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> The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice. [367 *U.S.* at 659–60, 81 *S.Ct.* at 1963–64, 6 *L.Ed.*2d at 1092–93 (footnote omitted).]

The question before us requires an appreciation of the conflicting views of the purpose and effectiveness of the exclusionary rule and the necessity and wisdom of the "good-faith" exception recognized by the Court in *Leon.* Moreover, we address this issue in the context of a federalist system

in which "enforcement of criminal laws in federal and state courts, sometimes involving identical episodes, encourages application of uniform rules governing search and seizure," *State v. Hunt,* 91 *N.J.* 338, 345, 450 *A.*2d 952 (1982), yet mindful that because a state ***102** constitution may afford enhanced protection for individual liberties, we "should not uncritically adopt federal constitutional interpretations for the New Jersey Constitution merely for the sake of consistency," *id.* at 355, 450 *A.*2d 952 (Pashman, J., concurring).

I

Defendant, Ottavio Novembrino, was indicted for possession of controlled dangerous substances contrary to *N.J.S.A.* 24:21–20(a)(1), (4), and possession of controlled dangerous substances with intent to distribute in violation of *N.J.S.A.* 24:21–19(a)(1). A motion to suppress evidence was filed pursuant to *Rule* 3:5–7.

****824** The suppression hearing resulted in sharply conflicting accounts of the circumstances surrounding defendant's arrest and the subsequent search of his service station. According to Detective Higgins, whose affidavit led to the issuance of the disputed search warrant, defendant was stopped by two officers from the Bayonne Police Department at about 6:15 p.m. on June 2, 1983. The stop occurred shortly after Novembrino closed his service station and was proceeding home by automobile. One officer conducted a pat-down search, while the other officer conducted a limited inspection of the interior of defendant's automobile. Defendant agreed to go with the officers to police headquarters. He drove to the station in his own car, accompanied by one of the officers. Detective Higgins testified that Novembrino was not placed under arrest and was free to leave, although neither officer advised him of his right to do so.

After being advised of his *Miranda* rights, Novembrino refused to consent to a search of his station. At about 6:30 p.m., Detective Higgins left a message requesting that the Bayonne municipal court judge telephone him. He then began to type an affidavit in support of a search warrant. Detective Higgins conceded that this was the first such affidavit he had ever prepared and estimated that its preparation took approximately ten or fifteen minutes. When the municipal court judge ***103** telephoned, Detective Higgins arranged to meet him at a shopping center. They met at approximately 6:50 p.m. The judge reviewed the affidavit and signed the warrant. Detective Higgins spoke with Detective Kelly by radio, and proceeded to the gas station where he met defendant and Detective Kelly. After Novembrino was shown the warrant, he unlocked the door to the service station and pointed out the location of the contraband.

Novembrino's testimony was substantially different. He stated that the officers pulled him over at approximately 6:45 p.m. Immediately, one officer searched him while the other searched his car. He was then taken to police headquarters where he was strip-searched. Detectives Kelly and Higgins then drove him back to his gas station. Novembrino testified that Higgins never left police headquarters and therefore could not have met a municipal court judge before returning to the service station. According to Novembrino, Officer Kelly took defendant's key and unlocked the door. The officers searched the station and discovered the contraband. Defendant testified that although he asked the police if they had a warrant, he was not shown a search warrant until approximately eleven o'clock that night.

At the suppression hearing, defendant argued that the affidavit did not establish probable cause and that the warrant was issued after the evidence had been seized. The trial court initially declined to consider whether the warrant was issued before or after the search, but suppressed the evidence on the ground that the affidavit submitted in support of the warrant failed to establish probable cause. On appeal, the Appellate Division remanded the matter for a hearing to determine when the warrant was issued. After hearing testimony, the trial court determined that the officers had obtained the search warrant prior to the search of the service station. The Appellate Division affirmed that finding on the basis that it was supported by sufficient credible evidence.

***104** In the Appellate Division, the State argued that the Higgins affidavit was sufficient to establish probable cause. The critical portion of the affidavit alleged:

> I received information from an informant who has proven reliable in several investigations (with the information he supplied), that 'Otto' above description, is engaged in the illegal sales of cocaine and marijuana. My informant stated that Otto usually keeps the drugs in his gas station at above location. He (informant) also stated that he witnessed 'Otto' dealing drugs from his gas station. I, along with Det. Ralph Scianni, conducted a surveillance of subject and his station ****825** on Thurs., 6/2/83, between the hours of 3:00 PM and 7:00 PM, and observed Otto meeting with several persons, after leaving his station and making what we

> believed to be drug transactions. During the surveillance, we observed one person making a transaction with Otto and checked on his vehicle and called the narcotics squad to inquire on his relationship with drugs. They told us that said person has been arrested for cocaine and other violations and they felt that Otto and the other person are involved in drug activity. From the information received from our informant and from our observations, we do feel that a search of Otto's gas station should be conducted for illegal contraband. We checked on ownership of the station and it belongs to Otto who we have presently in headquarters on this investigation. Otto was advised of his rights and refused a search of his station but appeared to be very nervous.

The Appellate Division concluded that the affidavit failed to establish probable cause:

> The affidavit here involved simply revealed that a police informant concluded for unknown reasons that defendant was a drug dealer, that a person previously arrested for possession of cocaine was seen at defendant's gas station engaged in some unspecified activities which caused a detective, whose education, training and experiences are unknown, to conclude that criminal activities in the form of violations of Title 24 were taking place at the gas station. The totality of the circumstances spelled out in the affidavit failed to contain a single objective fact tending to engender a "well grounded suspicion" that a crime was being committed. * * * We conclude, therefore, that probable cause was not established. [*State v. Novembrino,* 200 *N.J.Super.* 229, 236, 491 *A.*2d 37 (1985) (citation omitted).]

The State also argued that if probable cause was not established, the evidence should nevertheless be admissible on the basis of the good-faith exception recognized by the United States Supreme Court in *Leon.* The Appellate Division acknowledged that if *Leon* were followed in New Jersey, it would apply retroactively and thereby determine the admissibility of the evidence obtained at defendant's station. A majority of the Appellate Division was also satisfied that Detective Higgins ***105** had objectively and reasonably relied upon the warrant, which had been issued by a detached and neutral judge. Accordingly, the Appellate Division majority found that the record adequately raised the issue whether the good-faith exception should be applied under our State Constitution.

A majority of the Appellate Division panel determined that New Jersey should not recognize the good-faith exception because it would undermine the constitutional requirement of probable cause. 200 *N.J.Super.* at 244, 491 *A.*2d 37. In a concurring opinion, Judge Simpson agreed that probable cause had not been established. *Id.* at 245, 491 *A.*2d 37. However, he concluded that the applicability of the *Leon* doctrine was inappropriately considered by the majority, since no record had been made by the trial court as to whether the officer had relied in good faith on the search warrant. *Id.* at 245–46, 491 *A.*2d 37. We granted the State's motion for leave to appeal, 101 *N.J.* 305, 501*A.*2d 962 (1985).

II

The first issue we confront concerns the sufficiency of the affidavit that prompted the issuance of the warrant. The standard by which we measure the affidavit is probable cause, the standard imposed by both the fourth amendment and article I, paragraph 7 of the New Jersey Constitution. Unlike the exclusionary rule, derided by critics as judge-made and not mandated by the constitution,[3] probable cause is the ****826** constitutionally-imposed standard for determining whether a search and seizure is lawful.[4] Accordingly, it occupies a position of indisputable ***106** significance in search and seizure law. As the Supreme Court noted in *Henry v. United States:*

> The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against that practice.
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> That philosophy later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principle has survived to this day.

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> Evidence required to establish guilt is not necessary. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. [361 *U.S.* 98, 100–02, 80 *S.Ct.* 168, 170–71, 4 *L.Ed.*2d 134, 137–38 (1959) (footnotes omitted, citations omitted).]

Any nonconsensual search of a person or his property is a significant invasion of fundamental privacy rights. Nevertheless, enforcement of the criminal laws requires that the police employ searches to obtain proof of crime. The probable-cause requirement is the constitutionally-prescribed standard for distinguishing unreasonable searches from those that can be tolerated in a free society:

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's ***107** protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice. [*Brinegar v. United States,* 338 *U.S.* 160, 176, 69 *S.Ct.* 1302, 1311, 93 *L.Ed.* 1879, 1890–91 (1949).]

This Court has steadfastly recognized the historical significance of probable cause ****827** as the indispensable criterion for determining the validity of a search. In *State v. Macri,* 39 *N.J.* 250, 188 *A.*2d 389 (1963), Justice Jacobs unequivocally confirmed our insistence that warrants issued without probable cause would not be tolerated in New Jersey:

> The requirement for [a] search warrant is not a mere formality but is a great constitutional principle embraced by free men and expressed in substantially identical language in both our federal and state constitutions. It has its roots deep in English and colonial history. The highly abusive infringements of freedom and privacy which were the incidents of general warrants and writs of assistance allowing arrests and searches on suspicion alone were only too well-known to the American settlers. They wisely insisted on the inclusion, in the Bill of Rights, of the provision in the Fourth Amendment that the right of the people to be secure against unreasonable searches and seizures shall not be violated and that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." * * *
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> The [Fourth] Amendment sets a firm standard with respect to the essentials of a search warrant. Under its terms the search warrant is not to issue except upon probable cause, supported by oath or affirmation. The crucial determination is to be made not by the police officer but by a neutral issuing judge. Before the judge is in a position to make his determination for issuance, he must properly be made aware of the underlying facts or circumstances which would warrant a prudent man in believing that the law was being violated.

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> Our recent Rules Governing Search Warrants * * * expressly recognize, as they must, the constitutional need for a verified showing of probable cause before the issuing magistrate; and they implicitly acknowledge the basic requirement, which the federal cases have repeatedly asserted, that the showing be not merely of belief or suspicion, but of underlying facts or circumstances which would warrant a prudent man in believing that the law was being violated. Even if we are at liberty to do so, we have no inclination whatever to ***108** restrict or undermine the great force or uniform applicability of that safeguarding requirement. [*Id.* at 255–57, 260–61, 188 *A.*2d 389 (citation omitted).]

Before we examine the sufficiency of the affidavit relied on by the judge in this case, we shall review both the federal and state case law in order to determine the standard to be used in evaluating whether probable cause was established by Detective Higgins' affidavit.

A. *Probable Cause—Federal Case Law*

The evolution of federal case law applying the probable-cause standard to specific search warrants has not been distinguished by clarity and consistency. *See* Amsterdam, "Perspectives on the Fourth Amendment," 35 *Minn.L.Rev.* 349, 349 (1974).

In one of its most recent and significant probable-cause decisions, the Supreme Court observed that

> perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a "practical, nontechnical conception." "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." [*Illinois v. Gates,* 462 *U.S.* 213, 231, 103 *S.Ct.* 2317, 2328, 76 *L.Ed.*2d 527, 544 (1983) (quoting *Brinegar v. United States,* 338 *U.S.* 160, 175–76, 69 *S.Ct.* 1302, 1310–11, 93 *L.Ed.* 1879 (1949)).]

The Court's characterization of probable cause as a practical, nontechnical concept has been frequently repeated, even in cases in which the Court was sharply divided as to whether probable cause had been established. ****828** *See, e.g., Massachusetts v. Upton,* 466 *U.S.* 727, 730–33, 104 *S.Ct.* 2085, 2087–88, 80 *L.Ed.*2d 721, 726–27 (1984); *United States v. Harris,* 403 *U.S.* 573, 577, 91 *S.Ct.* 2075, 2079, 29 *L.Ed.*2d 723, 730 (1971); *Spinelli v. United States,* 393 *U.S.* 410, 419, 89 *S.Ct.* 584, 590–91, 21 *L.Ed.*2d 637, 645 (1969); *United States v. Ventresca,* 380 *U.S.* 102, 108, 85 *S.Ct.* 741, 745–46, 13 *L.Ed.*2d 684, 689 (1965); *Draper v. United States,* 358 *U.S.* 307, 313, 79 *S.Ct.* 329, 333, 3 *L.Ed.*2d 327, 332 (1959). Justice Potter Stewart attempted to explain why the judiciary's application of the probable cause standard—practical and nontechnical though it ***109** may be—has generated such markedly divergent views as to its mandate:

> The fourth amendment is no "technicality." The occupation of a judge requires application of its sweeping language to cases presenting the infinite variety of factual situations that arise in real life. The art of being a judge, if there is such an art, is in announcing clear rules in the context of these infinitely varied cases, rules that can be understood and observed by conscientious government officials. If the outcome of fourth amendment cases has come to be regarded as turning on "technicalities," it is in part because of the inevitable human shortcomings of judges faced with the task of articulating fourth amendment principles applicable in a broad range of situations while doing justice in a particular case. Most judges do their best, but that is not always good enough. ["The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases," 83 *Colum.L.Rev.* 1365, 1393 (1983).]

Apart from the central theme that probable cause is a nontechnical concept, the Supreme Court's probable-cause decisions have generated few sustaining principles. One such principle is that probable cause is not established by a conclusory affidavit that does not provide a magistrate with sufficient facts to make an independent determination as to whether the warrant should issue. The leading case for this proposition is *Nathanson v. United States,* 290 *U.S.* 41, 54 *S.Ct.* 11, 78 *L.Ed.* 159 (1933). There, the challenged warrant recited that a federal officer

> has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J.J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave. [*Id.* at 44, 54 *S.Ct.* at 12, 78 *L.Ed.* at 160.]

The Court held that the warrant had been issued without probable cause, observing that

> nothing * * * indicates that a warrant to search a private dwelling may rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances. [*Id.* at 47, 54 *S.Ct.* at 13, 78 *L.Ed.* at 161.]

Nathanson has consistently been followed by the Court, whether the conclusory allegations are asserted by the officer or by an informant whose observations are incorporated in the ***110** officer's affidavit. *See Whiteley v. Warden of Wyoming State Penitentiary,* 401 *U.S.* 560, 564, 91 *S.Ct.* 1031, 1034–35, 28 *L.Ed.*2d 306, 311 (1971); *Spinelli v. United States, supra,* 393 *U.S.* 410, 89 *S.Ct.* 584, 21 *L.Ed.*2d 637; *United States v. Ventresca, supra,* 380 *U.S.* 102, 85 *S.Ct.* 741, 13 *L.Ed.*2d 684; *Beck v. Ohio,* 379 *U.S.* 89, 85 *S.Ct.* 223, 13 *L.Ed.*2d 142 (1964); *Aguilar v. Texas,* 378 *U.S.* 108, 84 *S.Ct.* 1509, 12 *L.Ed.*2d 723 (1964); *Rugendorf v. United States,* 376 *U.S.* 528, 84 *S.Ct.* 825, 11 *L.Ed.*2d 887 (1964); *Jones v. United States,* 362 *U.S.* 257, 80 *S.Ct.* 725, 4 *L.Ed.*2d 697 (1960), overruled on other grounds, ****829** *United States v. Salvucci,* 448 *U.S.* 83, 100 *S.Ct.* 2547, 65 *L.Ed.*2d 619 (1980); *Giordenello v.*

United States, 357 *U.S.* 480, 78 *S.Ct.* 1245, 2 *L.Ed.*2d 1503 (1958).

The Court's insistence that an officer's affidavit allege specific facts and not conclusions is based on the principle that

> the inferences from the facts which lead to the complaint "[must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime. [*Giordenello v. United States, supra,* 357 *U.S.* at 486, 78 *S.Ct.* at 1250, 2 *L.Ed.*2d at 1509 (quoting *Johnson v. United States,* 333 *U.S.* 10, 14, 68 *S.Ct.* 367, 369, 92 *L.Ed.* 436, 440 (1948)).]

Another entrenched principle is that not only may a magistrate consider hearsay in determining probable cause, but hearsay alone can provide a sufficient basis for the warrant. Although the Court had impliedly accepted hearsay as a basis for probable cause in prior cases, *see Draper v. United States, supra,* 358 *U.S.* 307, 79 *S.Ct.* 329, 3 *L.Ed.*2d 327 and *Brinegar v. United States, supra,* 338 *U.S.* 160, 69 *S.Ct.* 1302, 93 *L.Ed.* 1879, it expressly held in *Jones v. United States, supra,* 362 *U.S.* 257, 80 *S.Ct.* 725, 4 *L.Ed.*2d 697, that an officer's affidavit could rely on information provided by an informant:

> The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by ***111** virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented. [*Id.* at 269, 80 *S.Ct.* at 735, 4 *L.Ed.* at 707.]

In *Jones* the Court did not attempt to set standards for determining what constitutes "a substantial basis for crediting the hearsay." That task was undertaken by the Court in *Aguilar v. Texas, supra,* 378 *U.S.* 108, 84 *S.Ct.* 1509, 12 *L.Ed.*2d 723, and in *Spinelli v. United States, supra,* 393 *U.S.* 410, 89 *S.Ct.* 584, 21 *L.Ed.*2d 637. These two decisions, superseded in 1983 by *Illinois v. Gates, supra,* 462 *U.S.* 213, 103 *S.Ct.* 2317, 76 *L.Ed.*2d 527, have for the past two decades been at the center of the debate concerning the sufficiency of an informant's observations in establishing probable cause.[5]

In *Aguilar,* a warrant to search for narcotics in the defendant's home was issued on the basis of an affidavit that alleged:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law. [378 *U.S.* at 109, 84 *S.Ct.* at 1511, 12 *L.Ed.*2d at 725.]

In sustaining the challenge to the admissibility of the evidence seized by the execution ****830** of the warrant, the Court established a "two-pronged test" to determine the sufficiency of an informant's tip. First, the tip must include information that apprises the magistrate of the basis for the informant's allegations (the "basis-of-knowledge" prong); and, second, the affiant must ***112** inform the magistrate of the basis for his reliance on the informant's credibility (the "veracity" prong). *See Illinois v. Gates, supra,* 462 *U.S.* at 267, 103 *S.Ct.* at 2347–48, 76 *L.Ed.*2d at 567 (White, J., concurring). Concluding that the affidavit did not meet these conditions, the Court determined that the warrant should not have issued:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, 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." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," or, as in this case, by an unidentified informant. [*Aguilar v. Texas, supra,* 378 *U.S.* at 114–15, 84 *S.Ct.* at 1514, 12 *L.Ed.*2d at 729 (quoting *Giordenello v. United States,* 357 *U.S.* at 486, 78 *S.Ct.* at 1250, 2 *L.Ed.*2d at 1509; *Johnson v. United States,* 333 *U.S.* at 14, 68 *S.Ct.* at 369, 92 *L.Ed.* at 440) (footnote omitted, citations omitted).]

Five years later, in *Spinelli v. United States, supra,* 393 *U.S.* 410, 89 *S.Ct.* 584, 21 *L.Ed.*2d 637, the Court sought to clarify *Aguilar* by delineating the manner in which the "two-pronged test" should be applied when the informant's

allegations, although inadequate standing alone, are partially verified by police investigation. The affidavit in *Spinelli* stated that a reliable informant had advised the FBI that "Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4–0029 and WYdown 4–0136." *Id.* at 414, 89 *S.Ct.* at 588, 21 *L.Ed.*2d at 642. To corroborate the informant's tip, the affidavit recited that Spinelli was observed for a period of five days, during four of which he traveled from Illinois to Missouri, parking in a lot adjacent to an apartment house and entering an apartment whose occupant possessed telephones assigned the same phone numbers as those provided by the informant. Although concluding that the FBI affidavit was insufficient to establish probable cause, the ***113** Court suggested that deficiencies in a search warrant affidavit incorporating information from an informant could be remedied both with respect to "basis-of-knowledge" and "veracity":

> If the tip is found inadequate under Aguilar, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in Aguilar must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration? [*Id.* at 415, 89 *S.Ct.* at 588, 21 *L.Ed.*2d at 643.]

The majority in *Spinelli* observed that if an affidavit is deficient in its recitation as to the basis of the informant's knowledge, the self-verifying details of the informant's tip can overcome this deficiency:

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual ****831** rumor circulating in the underworld or an accusation based merely on an individual's general reputation. [*Id.* at 416, 89 *S.Ct.* at 589, 21 *L.Ed.*2d at 644.]

The Court also acknowledged that the informant's veracity, if inadequately documented in the officer's affidavit, could be bolstered by a corroborative investigation, but concluded that the veracity of the *Spinelli* informant had not sufficiently been established:

> Nor do we believe that the patent doubts Aguilar raises as to the report's reliability are adequately resolved by a consideration of the allegations detailing the FBI's independent investigative efforts. At most, these allegations indicated that Spinelli could have used the telephones specified by the informant for some purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way. Once again, *Draper* provides a relevant comparison. Independent police work in that case corroborated much more than one small detail that had been provided by the informant. There, the police, upon meeting the inbound Denver train on the second morning specified by informer Hereford, saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that the informant had not been fabricating his report out of whole cloth; since ***114** the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established. [*Id.* at 418, 89 *S.Ct.* at 590, 21 *L.Ed.*2d at 644.][6]

In *Illinois v. Gates, supra,* the Court abandoned its exclusive reliance on the *Aguilar-Spinelli* two-pronged test for evaluating information provided by an informant, adopting in its place "the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations." 462 *U.S.* at 238, 103 *S.Ct.* at 2332, 76 *L.Ed.*2d at 548. However, the Court took pains to point out that

> ***115** an informant's "veracity," "reliability," and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements ****832** to be rigidly exacted in every case * * *. Rather, * * * they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place. [*Id.* at 230, 103 *S.Ct.* at 2328, 76 *L.Ed.*2d at 543.]

Gates involved the sufficiency of an affidavit offered in support of a search warrant authorizing the search of the defendants' car and house. The application for the warrant was triggered by an anonymous, handwritten letter sent to the Bloomingdale, Illinois Police Department that alleged:

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> "They brag about the fact they never have to work, and make their entire living on pushers.
>
> "I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.
>
> "Lance & Susan Gates
>
> "Greenway
>
> "in Condominiums" [*Id.* at 225, 103 *S.Ct.* at 2325, 76 *L.Ed.*2d at 540.]

Detective Mader of the Bloomingdale Police Department investigated the anonymous tip and learned that an Illinois driver's license had been issued to Lance Gates of Bloomingdale. He also learned that an individual named "L. Gates" had a reservation on a flight to West Palm Beach, Florida, departing from Chicago on May 5th. At Mader's request, an agent of the Drug Enforcement Administration conducted a surveillance and observed Gates board a flight destined for West Palm Beach. He also reported that federal agents in Florida had observed Gates' arrival in West Palm Beach and confirmed that he had traveled from the airport by taxi to a nearby motel. The agents reported that Gates had entered a room in the motel ***116** registered to Susan Gates. The next morning Gates and an unidentified woman left the motel in a Mercury automobile with Illinois license plates. They drove northbound on an interstate highway generally used by travelers bound for Chicago. The license plate number on the Mercury was identified by the federal agents as one registered to a station wagon owned by Gates.

Detective Mader prepared an affidavit that incorporated the details learned during the investigation. He submitted the affidavit, along with a copy of the anonymous letter, to a county court judge. The judge issued a search warrant that authorized the searches of the Gates' residence and automobile. On May 7, when Lance Gates and his wife returned to their home in Bloomingdale, the Bloomingdale police searched the trunk of the Mercury and discovered approximately 350 pounds of marijuana. During a search of the Gates' home the officers found marijuana, weapons, and other contraband.

The Illinois Circuit Court suppressed the evidence on the ground that the affidavit submitted in support of the search warrant did not establish probable cause. That decision was affirmed by the Illinois Appellate Court, 82 *Ill.App.*3d 749, 38 *Ill.Dec.* 62, 403 *N.E.*2d 77 (1980), and by the Supreme Court of Illinois, 85 *Ill.*2d 376, 53 *Ill.Dec.* 218, 423 *N.E.*2d 887 (1981).

Relying on the two-pronged analysis derived from *Aguilar* and *Spinelli,* the Illinois Supreme Court concluded that the ****833** anonymous letter, supplemented by Detective Mader's affidavit, did not satisfy either the "veracity" or the "basis-of-knowledge" prong established by *Aguilar.* The court concluded that there was no basis for determining that the anonymous letter writer was credible, and that the corroboration by police of innocent details contained in the letter could not satisfy the "veracity" requirement. *Id.* at 384–90, 53 *Ill.Dec.* at 222–24, 423 *N.E.*2d at 891–93. In addition, the court observed that the anonymous letter did not reveal the source of its author's knowledge and concluded that the detail set forth in the letter ***117** was not sufficient to justify an inference that the contents of the letter had been obtained from a reliable source. *Id.*

Justice Rehnquist, writing for the *Gates* majority, agreed with the Illinois Supreme Court that the anonymous letter, standing alone

> provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gateses' criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gateses' home and car. [462 *U.S.* at 227, 103 *S.Ct.* at 2326, 76 *L.Ed.*2d at 541.]

Rejecting the Illinois Supreme Court's reliance on *Aguilar* and *Spinelli,* the Court determined that the independent investigation by the federal agents and the Bloomingdale police adequately verified the reliability of the informant's

tip. The Court observed that the *Aguilar-Spinelli* two-pronged analysis was overly technical and ill-suited to guide determinations of probable cause:

> [T]he "two-pronged test" directs analysis into two largely independent channels—the informant's "veracity" or "reliability" and his "basis of knowledge." There are persuasive arguments against according these two elements such independent status.
>
> —
>
> The rigorous inquiry into the Spinelli prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our Spinelli decision, cannot be reconciled with the fact that many warrants are—quite properly—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings. Likewise, given the informal, often hurried context in which it must be applied, the "built-in subtleties," of the "two-pronged test" are particularly unlikely to assist magistrates in determining probable cause. [*Id.* at 233, 235–36, 103 *S.Ct.* at 2329, 2331, 76 *L.Ed.*2d at 546 (citations omitted).]

Nevertheless, in formulating the elements of the totality-of-the-circumstances analysis, the Court recognized the continued relevance of an informant's veracity and basis of knowledge:

> 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 ***118** a crime will be found in a particular place. * * * We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from Aguilar and Spinelli. [*Id.* at 233, 238–39, 103 *S.Ct.* at 2329, 2332, 76 *L.Ed.*2d at 545, 548 (emphasis added, citations omitted).]

The *Gates* majority also observed that the totality-of-the-circumstances test provided magistrates with wider discretion to grant or refuse warrants than had been ****834** permitted under the *Aguilar-Spinelli* rules:

> Nothing in our opinion in any way lessens the authority of the magistrate to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant; *indeed, he is freer than under the regime of Aguilar and Spinelli to draw such inferences, or to refuse to draw them if he is so minded.* [*Id.* at 240, 103 *S.Ct.* at 2333, 76 *L.Ed.*2d at 549 (emphasis added).][7]

Finally, the Court explicitly limited the permissible scope of appellate review of the probable cause determination made by the warrant-issuing judge, holding that the fourth amendment did not require *de novo* review as to the validity of the warrant:

> [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." "A grudging or negative attitude by reviewing courts towards warrants," is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner."
>
> —
>
> Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for ... conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. [*Id.* at 236, 103 *S.Ct.* at 2331, 76 *L.Ed.*2d at 546–47 (quoting *Spinelli* ***119** *v. United States,* 393 *U.S.* 410, 419, 89 *S.Ct.* 584, 590–91, 21 *L.Ed.*2d 637; *United States v. Ventresca,* 380 *U.S.* 102, 108–09, 85 *S.Ct.* 741, 745–46, 13 *L.Ed.*2d 684; *Jones v. United States,* 362 *U.S.* 257, 271, 80 *S.Ct.* 725, 736, 4 *L.Ed.*2d 697).][8]

To sum up, the impact of *Gates* on fourth amendment probable-cause determinations is two-fold. First, by adopting the totality-of-the-circumstances analysis, it signals a reemphasis of the "practical, nontechnical conception" of probable cause endorsed in *Brinegar v. United States, supra,* 338 *U.S.* 160, 69 *S.Ct.* 1302, 93 *L.Ed.* 1879, but does so without repudiating the ****835** relevance of "veracity" and "basis-of-knowledge" inquiries with respect to allegations by informants. Second, it limits the scope of federal appellate

review mandated by the fourth amendment as to probable-cause determinations by the warrant-issuing magistrate.

B. *Probable Cause—New Jersey Case Law*

This Court's decisions in cases concerning probable cause have been relatively uncontroversial. As would be expected, ***120** many of our opinions emphasize the same principles that have been recognized by decisions in the federal courts. We have consistently characterized probable cause as a common-sense, practical standard for determining the validity of a search warrant. In *State v. Kasabucki,* 52 *N.J.* 110, 116, 244 *A.*2d 101 (1968), we said:

> Probable cause is a flexible, nontechnical concept. It includes a conscious balancing of the governmental need for enforcement of the criminal law against the citizens' constitutionally protected right of privacy. It must be regarded as representing an effort to accommodate those often competing interests so as to serve them both in a practical fashion without unduly hampering the one or unreasonably impairing the significant content of the other.

See State v. Davis, 50 *N.J.* 16, 24, 231 *A.*2d 793 (1967), *cert. denied,* 389 *U.S.* 1054, 88 *S.Ct.* 805, 19 *L.Ed.*2d 852 (1968); *State v. Laws,* 50 *N.J.* 159, 173, 233 *A.*2d 633 (1967), *cert. denied,* 393 *U.S.* 971, 89 *S.Ct.* 408, 21 *L.Ed.*2d 384 (1968); *State v. Mark,* 46 *N.J.* 262, 271, 216 *A.*2d 377 (1966); *State v. Contursi,* 44 *N.J.* 422, 428–29, 209 *A.*2d 829 (1965); *State v. Boyd,* 44 *N.J.* 390, 393, 209 *A.*2d 134 (1965).

This Court has also been unwavering in its insistence that affidavits submitted in support of a warrant application allege specific facts so that the issuing judge can determine independently whether or not probable cause has been established:

> The crucial determination is to be made not by the police officer but by a neutral issuing judge. Before the judge is in a position to make his determination for issuance, he must properly be made aware of the underlying facts or circumstances which would warrant a prudent man in believing that the law was being violated. Legal proof sufficient to establish guilt is, of course, not required; but suspicion and good faith on the officer's part, without more, will not suffice. As the Supreme Court succinctly put it in *Nathanson v. United States,* a search warrant may not issue unless the issuing magistrate can find probable cause from the facts or circumstances presented to him under oath or affirmation—"Mere affirmance of belief or suspicion is not enough." [*State v. Macri, supra,* 39 *N.J.* at 257, 188 *A.*2d 389 (quoting *Nathanson v. United States,* 290 *U.S.* 41, 47, 54 *S.Ct.* 11, 13, 78 *L.Ed.* 159 (1933)).]

See State v. Fariello, 71 *N.J.* 552, 564–65, 366 *A.*2d 1313 (1976); *State v. Ebron,* 61 *N.J.* 207, 212, 294 *A.*2d 1 (1972); *State v. Mark, supra,* 46 *N.J.* at 273, 216 *A.*2d 377; *State v. Moriarty,* 39 *N.J.* 502, 503, 189 *A.*2d 210 (1963); *State v. Burrachio,* 39 *N.J.* 272, 275–76, 188 *A.*2d 401 (1963).

Like the federal courts, we have permitted reliance on hearsay for the purpose of establishing probable cause, but have ***121** insisted that the officer's affidavit provide the warrant-issuing judge with a substantial basis for crediting the hearsay. *State v. Ebron, supra,* 61 *N.J.* at 212, 294 *A.*2d 1; *State v. Perry,* 59 *N.J.* 383, 394, 283 *A.*2d 330 (1971); *State v. Burrachio, supra,* 39 *N.J.* at 275, 188 *A.*2d 401; *State v. Macri, supra,* 39 *N.J.* at 262, 188 *A.*2d 389; *State v. Southard,* 144 *N.J.Super.* 501, 504, 366 *A.*2d 692 (App.Div.1976).

We have infrequently been required to consider the validity of warrants based on hearsay in the context of the *Aguilar-Spinelli* two-pronged test. In *State v. Perry, supra,* 59 *N.J.* 383, 283 *A.*2d 330, the affidavit was based on information "from a reliable informant, who ha[d] in the past ****836** given reliable information leading to arrests," that stolen property consisting of "monies, jewelry, doctor's bag, narcotics barbituates [sic], and narcotics paraphernalia" could be found in the defendant's apartment. *Id.* at 387, 283 *A.*2d 330. We held that the informant's veracity was adequately established by the officer's reference to his past reliability. As to the "basis-of-knowledge" prong, we noted that

> the information contained in the informant's tip is of such a detailed nature that it could reasonably lead a magistrate to infer that the informant had probably observed the items himself which he knew to be stolen, or had gained his information in a reliable way. * * * We think the detailed description in this case * * * is of the type which the *Spinelli* Court regarded as sufficient to establish that the information was obtained in a reliable way. [*Id.* at 392, 283 *A.*2d 330.]

In *State v. Ebron, supra,* 61 *N.J.* 207, 294 *A.*2d 1, the officer's allegation that defendant was selling narcotics from his mother's home was based in part on information from an "informant who ha[d] prove[n] reliable in the past"[9] and in part on a surveillance of the residence by police over a three-day period. We concluded that the officer's assertions as to the informant's past reliability satisfied the

veracity prong of *Aguilar-Spinelli,* but that the "basis-of-knowledge" prong had not been satisfied. *Id.* at 212, 294 *A.*2d 1. Nevertheless, the warrant was sustained on the ground that although the informant's tip did not satisfy the "basis-of-knowledge" prong, it could be supplemented by the "totality of the ***122** proofs submitted to the issuing magistrate," *id.,* including the facts established by the officers during their surveillance of defendant's residence.[10] We held that "[w]hen the informant's statement fails to meet this 'two-pronged test,' the affidavit may nevertheless be sufficient if elsewhere in the application there is enough to 'permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed.' We think the affidavit before us meets this test." 61 *N.J.* at 212, 294 *A.*2d 1 (quoting *Spinelli v. United States,* 393 *U.S.* 410, 418, 89 *S.Ct.* 584, 590, 21 *L.Ed.*2d 637).

C. *Validity of the Warrant*

As a preliminary matter, and for guidance to trial and appellate courts and law enforcement officials, we acknowledge our intention to apply a totality-of-the-circumstances test analogous to that set forth in *Illinois v. Gates, supra,* 462 *U.S.* at 238, 103 *S.Ct.* at 2332, 76 *L.Ed.*2d at 548, to test the validity of search warrants under the probable-cause standard set forth in article I, paragraph 7 of the New Jersey Constitution.[11] We note that those commentators who have focused on the decision differ in their assessment of its significance. *Compare* Kamisar, ***123** "*Gates,* 'Probable Cause,' 'Good Faith,' and Beyond," 69 *Iowa L.Rev.* 551, 578 (1984) (interpreting *Gates* as dismantling the two-pronged test), *with* LaFave, ****837** "Fourth Amendment Vagaries of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew," 74 *Crim.L. & Criminology* 1171, 1195 (1983), and Moylan, "Illinois v. Gates: What It Did and What It Did Not Do," 20 *Crim.L.Bull.* 93, 115 (1984) (both interpreting *Gates* as consistent with continued application of the *Aguilar-Spinelli* factors in evaluating informants' tips). In our view, the *Gates* totality-of-the-circumstances analysis is consistent with the approach this Court has traditionally employed in resolving probable-cause issues. *See State v. Ebron, supra,* 61 *N.J.* 207, 294 *A.*2d 1; *State v. Kasabucki, supra,* 52 *N.J.* 110, 244 *A.*2d 101; *State v. Laws, supra,* 50 *N.J.* at 173, 233 *A.*2d 633. As the majority in *Gates* conceded, search-warrant applications that rely in part on an informant's tip will continue to require thorough scrutiny of the informant's veracity and basis of knowledge in the context of the totality of the facts contained in the officer's showing of probable cause. *Illinois v. Gates, supra,* 462 *U.S.* at 238–39, 103 *S.Ct.* at 2332, 76 *L.Ed.*2d at 548. We would also note, as illustrated by the affidavit in this case, that the *Aguilar-Spinelli* analysis—useful though it may be in assessing the weight to be accorded to an informant's tip—does not necessarily end the inquiry as to an affidavit's sufficiency in establishing probable cause.

In this case Detective Higgins' affidavit relies in part on information obtained from an unidentified informant. The affidavit's reference to the informant appears to comply with both prongs of the *Aguilar-Spinelli* test. The informant's veracity is supported by Detective Higgins' unvarnished statement that he "has proven reliable in several investigations (with the information he supplied)." We have in the past accepted a similarly undetailed endorsement of an informant as satisfying the veracity requirement. *State v. Perry, supra,* 59 *N.J.* at 390, 283 *A.*2d 330; *compare Stanley v. State,* 19 *Md.App.* 507, 512-13, 313 *A.*2d 847, 851 (1974) (where informant satisfied *Aguilar* 's veracity ***124** prong with "flying colors."). Similarly, the informant's "basis of knowledge" is clearly established by the assertion that "he witnessed 'Otto' dealing drugs from his gas station."

Although the affidavit's reference to the informant satisfies the *Aguilar-Spinelli* test, the substantive information obtained from the informant is meager indeed. One critical deficiency is that the affidavit furnishes no information whatsoever as to *when* the informant allegedly "witnessed" the drug sales. Consequently, the informant's allegations, standing alone, were inadequate to provide a neutral judicial officer with a reasonable basis for suspicion that a *present* search of Novembrino's premises would yield evidence of criminal activity. In *Rosencranz v. United States,* 356 *F.*2d 310 (1st Cir.1966), the court rejected a similar affidavit, which contained no time reference other than the fact that the affidavit was phrased in the present tense. In holding the warrant invalid, the court cautioned:

> The present tense is suspended in the air; it has no point of reference. It speaks, after all, of the time when an anonymous informant conveyed information to the officer, which could have been a day, a week, or months before the date of the affidavit. To make a double inference, that the undated information speaks as of a date close to that of the affidavit and that therefore the undated observation made on the strength of such information must speak as of an even more recent date would be to open the door to the unsupervised issuance of search warrants on the basis of aging information. Officers with information

> of questionable recency could escape embarrassment by simply omitting averments as to time, so long as they reported that whatever information they received was stated to be current at that time. Magistrates would have less opportunity to perform their "neutral and detached" function. Indeed, if the affidavit in this case be adjudged valid, it is difficult to see how any ****838** function but that of a rubber stamp remains for them. [*Id.* at 316–17.]

Accord United States v. Boyd, 422 *F.*2d 791 (6th Cir.1970); *United States v. Elliott,* 576 *F.Supp.* 1579 (S.D.Ohio 1984); *State in Interest of R.B.C.,* 183 *N.J.Super.* 121, 443 *A.*2d 271 (J.D.R.C.1981); *see* 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment,* § 3.7(b) at 693 (1978) (hereinafter LaFave, *Search and Seizure*).[12]

***125** In addition, the unidentified informant's conclusory allegations that "Otto usually keeps the drugs in the gas station" and that he "witnessed Otto dealing drugs" are unsupported by any specific facts from which a neutral judge could independently derive a reasonable suspicion that a search would yield evidence of criminal activity. The fact that a police officer may be willing to believe the tip of an informant—particularly one who has been helpful on prior occasions—does not lessen the judge's duty to scrutinize the substance of the tip in order to weigh its sufficiency against the practical standard of probable cause. As Justice Jacobs observed in *State v. Macri, supra,* "Before the judge is in a position to make his determination for issuance, he must properly be made aware of the underlying facts or circumstances which would warrant a prudent man in believing that the law was being violated." 39 *N.J.* at 257, 188 *A.*2d 389. Here, the informant's tip is a bald conclusion, allegedly based on personal observation, but unsupported by any reference to dates, events, or circumstances.

Because the informant's allegations, standing alone, are insufficient to establish probable cause, we focus on the independent observations made by Detectives Higgins and Scianni to determine if they adequately supplement the informant's ***126** allegations.[13] We first observe that the affidavit is silent with regard to the officers' experience in investigating and apprehending drug dealers. Although we acknowledge that a police officer's experience with specific forms of criminal activity is entitled to consideration in assessing whether probable cause has been established, *see Texas v. Brown,* 460 *U.S.* 730, 742–43, 103 *S.Ct.* 1535, 1543–44, 75 *L.Ed.*2d 502, 514 (1983); *United States v. Cortez,* 449 *U.S.* 411, 421–22, 101 *S.Ct.* 690, 697, 66 *L.Ed.*2d 621, 631 (1981); *State v. Kasabucki, supra,* 52 *N.J.* at 117, 244 *A.*2d 101; *State v. Sainz,* 210 ****839** *N.J.Super.* 17, 22 (App.Div.), certif. granted, 104 *N.J.* 453 (1986), nothing in this affidavit suggests that any of the investigating officers had a particular familiarity with drug transactions.

The crux of the officers' direct observations is summarized by one sentence in the affidavit:

> I, along with Det. Ralph Scianni, conducted a surveillance of subject and his station on Thurs., 6/2/83, between the hours of 3:00 PM and 7:00 PM, and observed Otto meeting with several persons, after leaving his station and making what we believed to be drug transactions.

The critical phrase is that the officers observed Otto "making what we believed to be drug transactions." If the officers had a reasonable suspicion that they were in fact witnessing drug transactions, they would have been authorized to arrest defendant on the spot. *Adams v. Williams,* 407 *U.S.* 143, 148–49, 92 *S.Ct.* 1921, 1924–25, 32 *L.Ed.*2d 612, 618 (1972); ***127** *Beck v. Ohio,* 379 *U.S.* 89, 91, 85 *S.Ct.* 223, 225, 13 *L.Ed.*2d 142, 145 (1964); *State v. Macuk,* 57 *N.J.* 1, 8, 268 *A.*2d 1 (1970); *State v. Doyle,* 42 *N.J.* 334, 349, 200 *A.*2d 606 (1964). The officers in this case requested defendant to accompany them to police headquarters but, pointedly, did not place him under arrest.

Additionally, the affidavit is utterly devoid of specific facts witnessed by the officers from which the judge could have independently concluded that their suspicions were reasonable. The affidavit does not state with particularity what the officers observed or why the officers believed that drugs were being sold. It does not inform the judge in what respect the transactions observed by the officers differed from routine service station transactions. The only specific allegation offered is that an identification check was made with respect to one vehicle that entered the service station that day—after its occupant completed "a transaction" with defendant—and the check revealed that the vehicle's owner had been arrested on charges related to drugs. That factual insertion is insufficient to overcome the deficiencies in detail and substance to which we have averted.

In his concurrence in *Spinelli v. United States, supra,* 393 *U.S.* 410, 89 *S.Ct.* 584, 21 *L.Ed.*2d 637, Justice White emphasized that an affidavit must include specific facts to support a police officer's suspicions:

> If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from

which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else. If (1) is true, the affidavit is good. But in (2), the affidavit is insufficient unless the perceived facts are given, for it is the magistrate, not the officer, who is to judge the existence of probable cause. With respect to (3), where the officer's information is hearsay, no warrant should issue absent good cause for crediting that hearsay. [393 *U.S.* at 423–24, 89 *S.Ct.* at 592–93, 21 *L.Ed.*2d at 648 (citations omitted).]

We are in complete agreement with the trial court and the Appellate Division that this affidavit, read tolerantly and nontechnically, simply does not pass constitutional muster. Our dissenting colleague, Justice Garibaldi, agrees that the affidavit ***128** does not establish probable cause. The conclusory allegations of the officers are even less certain and less persuasive than the conclusory and vague allegations of the informant. Our common-sense review of these circumstances leads to the conclusion that the officers, after an abbreviated investigation, were uncertain whether they had seen drug sales and their informant was vague about what he had seen and silent as to when he had seen it. Read together, the allegations of the informant and of the officers did not provide the issuing judge with sufficient facts on which to base an independent determination as to the existence of probable cause.

****840** We emphasize that our conclusion as to the inadequacy of the affidavit, notwithstanding its literal compliance with both prongs of *Aguilar-Spinelli,* is thoroughly consistent with our application, as a matter of state-constitutional law, of a totality-of-the-circumstances test. As Justice Rehnquist observed in *Gates,* under that standard the issuing judge "is freer than under the regime of Aguilar and Spinelli to draw such inferences, or to refuse to draw them if he is so minded." 462 *U.S.* at 240, 103 *S.Ct.* at 2333, 76 *L.Ed.*2d at 549. In our view, the judge in this case was not presented with facts sufficient to permit the inference of the existence of probable cause and, therefore, the warrant was improperly issued.

One might assume from the sparseness of the allegations submitted to the judge that these officers may have observed additional facts that simply were omitted from the body of the affidavit. It is not sufficient that police officers are aware of facts adequate to support a warrant if they fail to communicate these facts to the issuing judge. Any such facts, if offered as testimony to the judge and recorded contemporaneously, could be considered by the judge as supplementing the contents of the affidavit. *State v. Fariello, supra,* 71 *N.J.* at 558–63, 366 *A.*2d 1313. Nothing in the record before us suggests that Detective Higgins supplemented his affidavit with testimony when he appeared before the judge to obtain the warrant.

***129** Independent of our conclusion as to the affidavit's insufficiency to establish probable cause, we note that the affidavit was prepared hastily—the time for its preparation was estimated to be ten or fifteen minutes—and that it was the officer's first experience in preparing an affidavit in support of a search warrant. Although the affidavit antedates the Attorney General's 1985 Policy Statement,[14] which requires the review of search warrant affidavits by either the Attorney General's or the county prosecutor's staff, the record in this case reflects that the affidavit was not reviewed by any of the officer's superiors in the Bayonne Police Department. Our observations as to the officer's experience, the time spent in preparing the affidavit, and the absence of any review reflect our conviction that an affidavit in support of a search warrant must be carefully prepared and reviewed to assure that it faithfully reflects the results of the police investigation and provides a judge with sufficient detail to enable him to perform his constitutionally-mandated review. As we have stated, the standards for preparation of an adequate affidavit are more practical than technical, and the necessary skills can readily be acquired by a well-trained police officer. We perceive no incompatibility between the skills and objectives of law-enforcement officials and the constitutional requirement that warrants issue only upon probable cause.

III

In view of our conclusion that the search warrant was issued without probable cause, we now consider the State's contention that we hold the evidence to be admissible by construing article I, paragraph 7 of the New Jersey Constitution to permit recognition of the "good-faith" modification of the exclusionary rule ***130** set forth in *United States v. Leon, supra,* 468 *U.S.* 897, 104 *S.Ct.* 3405, 82 *L.Ed.*2d 677.[15]

****841** Preliminarily, we note that the concurring opinion in the Appellate Division cautions that review of the good-faith exception in this case may be inappropriate. 200 *N.J.Super.* at 245, 491 *A.*2d 37. That opinion observed that retroactive

application of *Leon* is "doubtful" and that, unlike *Leon,* the trial court in this case made no finding that the officer reasonably relied in good faith on the warrant in searching defendant's service station. *Id.* at 246, 491 *A.*2d 37. Although both the search and the hearing on the suppression motion in this case antedate *Leon,* we assume without deciding the question that the decision in *Leon* was intended to apply retroactively. As the Eighth Circuit noted in *United States v. Sager,* 743 *F.*2d 1261, 1264–65 (1984), *cert. denied,* 469 *U.S.* 1217, 105 *S.Ct.* 1196, 84 *L.Ed.*2d 341 (1985), on the day *Leon* was decided the Supreme Court granted *certiorari* and vacated the judgments in several fourth-amendment cases, remanding them for further consideration in light of *Leon.*[16] ***131** Moreover, those federal circuit courts that have addressed the issue have uniformly concluded that *Leon* has retroactive application. *See United States v. Merchant,* 760 *F.*2d 963, 968–69 (9th Cir.1985), *cert. granted,* 478 *U.S.* 1003, 106 *S.Ct.* 3293, 92 *L.Ed.*2d 708 (1986); *United States v. Sager, supra,* 743 *F.*2d at 1264–65; *United States v. Hendricks,* 743 *F.*2d 653, 656 (9th Cir.1984), *cert.* denied, 470 *U.S.* 1006, 105 *S.Ct.* 1362, 84 *L.Ed.*2d 382 (1985).

As to the issue of the officers' objective good-faith reliance on the warrant, the Court's opinion in *Leon* would apply the good-faith exception whenever "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." 468 *U.S.* at 920, 104 *S.Ct.* at 3420, 82 *L.Ed.*2d at 697.[17] Accordingly, assuming that the magistrate did not abandon his detached and neutral role, *Leon* would permit suppression "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 926, 104 *S.Ct.* at 3423, 82 *L.Ed.*2d at 701. No testimony at the suppression hearing in this case suggested that the affidavit was false. Despite our conclusions as to its insufficiency, its defects are not so blatant as to preclude an objectively reasonable reliance on the validity of the warrant.[18]

****842** ***132** The Appellate Division majority was satisfied from its examination of the record that Detective Higgins' reliance on the warrant was objectively reasonable. 200 *N.J.Super.* at 237, 491 *A.*2d 37. Our dissenting colleague, however, cautions that without further police investigation and competent review of the warrant application, she would not in future cases consider police reliance on a warrant issued under these circumstances to be objectively reasonable. *Post* at 186-88. For the purpose of our discussion of the good-faith exception to the exclusionary rule, and in view of our disposition of the issue, we adopt, without conceding its correctness, the conclusion of the Appellate Division majority on the issue of the officer's objectively reasonable reliance on the warrant.

A. *The Exclusionary Rule: Development and Modifications Prior to United States v. Leon*

Our consideration of the "good-faith" modification recognized in *Leon* can be undertaken only in the context of the history and application of the exclusionary rule prior to the *Leon* decision.[19] Although the origin of the exclusionary rule can be traced to ***133** *Boyd v. United States,* 116 *U.S.* 616, 6 *S.Ct.* 524, 29 *L.Ed.* 746 (1886),[20] the first criminal case in which the rule was applied was ***134** *Weeks v. United States, supra,* 232 *U.S.* 383, 34 *S.Ct.* 341, 58 *L.Ed.* 652. The defendant in *Weeks* was tried for and convicted of illegal gambling. Before ****843** trial he had moved for the return of incriminating records and letters that had been seized by government officials during a warrantless search of his home. The Court reversed the conviction, holding that the fourth amendment barred the use of the illegally-seized evidence:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution. * * * To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action. [*Id.* at 393–94, 34 *S.Ct.* at 344–45, 58 *L.Ed.* at 656.]

The scope of the exclusionary rule was expanded in the early 1920's when the Court decided *Silverthorne Lumber v. United States,* 251 *U.S.* 385, 40 *S.Ct.* 182, 64 *L.Ed.* 319 (1920), and *Gouled v. United States,* 255 *U.S.* 298, 41 *S.Ct.* 261, 65 *L.Ed.* 647 (1921). In *Silverthorne,* federal officers illegally raided the office of a lumber company. After copying the books and papers seized, the agents returned them to the company. A subpoena then issued to compel the production of the documents. The company refused to comply with the subpoena and was found guilty of contempt. The Court reversed the conviction, rejecting the government's contention that the *Weeks* decision compelled only the return of the illegally-seized evidence, but did not preclude the

government from using information obtained in the course of the search:

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the constitution covers the physical possession, but not any advantages that the government can gain over the object of its ***135** pursuit by doing the forbidden act. * * * In our opinion such is not the law. It reduces the 4th Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. [251 *U.S.* at 391–92, 40 *S.Ct.* at 182–83, 64 *L.Ed.* at 321 (citations omitted).]

In *Gouled, supra,* 255 *U.S.* 298, 41 *S.Ct.* 261, 65 *L.Ed.* 647, the Court held that the exclusionary rule would be applied even though the defendant did not seek the return of the seized evidence before trial, effectively overruling the Court's earlier decision in *Adams v. New York,* 192 *U.S.* 585, 24 *S.Ct.* 372, 48 *L.Ed.* 575 (1904).[21]

It was not until 1949, in *Wolf v. Colorado,* 338 *U.S.* 25, 69 *S.Ct.* 1359, 93 *L.Ed.* 1782, that the Court was called upon to decide whether the due-process clause of the fourteenth amendment required state courts to apply and enforce the exclusionary rule. Although concluding that the critical interest protected by the fourth amendment—"the security of one's privacy against arbitrary intrusion by the police," *id.* at 27, 69 *S.Ct.* at 1361, 93 *L.Ed.* at 1785—was enforceable against the states through the due process clause, the Court refused to impose the exclusionary rule on the states, observing that the states were free to rely on other methods that "would be equally effective," *id.* at 31, 69 *S.Ct.* at 1363, 93 *L.Ed.* at 1787.[22] The opinion in ****844** *Wolf* noted that courts in seventeen states had determined to follow the holding in *Weeks* and courts in thirty states had declined to follow it.[23] In dissent, Justice Murphy rejected the ***136** majority's suggestion that remedies other than exclusion could be equally effective:

> Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. But this Court is limited to the remedies currently available. It cannot legislate the ideal system. If we would attempt the enforcement of the search and seizure clause in the ordinary case today, we are limited to three devices: judicial exclusion of the illegally obtained evidence; criminal prosecution of violators; and civil action against violators in the action of trespass.
>
> Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all. [*Id.* at 41, 69 *S.Ct.* at 1369, 93 *L.Ed.* at 1793.]

The impact of *Wolf* was to be relatively short-lived. In *Rochin v. California,* 342 *U.S.* 165, 72 *S.Ct.* 205, 96 *L.Ed.* 183 (1952), the Court applied the exclusionary rule to a state criminal prosecution to exclude evidence obtained by police misconduct "so brutal and so offensive to human dignity" that it "shocks the conscience."[24] *Id.* at 174, 172, 72 *S.Ct.* at 210, 209, 96 *L.Ed.* at 191, 190. Then, in *Irvine v. California,* 347 *U.S.* 128, 74 *S.Ct.* 381, 98 *L.Ed.* 561 (1954), the Court, in a 5–4 decision, upheld a bookmaking conviction based in part on testimony reciting the defendant's incriminating statements that were overheard by means of a microphone that had been illegally planted by police in a closet in defendant's residence. Justice Frankfurter, the author of *Wolf,* dissented, and Justice Clark, although disagreeing with the *Wolf* decision, concurred in the judgment on the basis of *Wolf,* which he followed with "great reluctance." *Id.* at 139, 74 *S.Ct.* at 387, 98 *L.Ed.* at 572.

A further erosion of *Wolf* occurred in *Elkins v. United States,* 364 *U.S.* 206, 80 *S.Ct.* 1437, 4 *L.Ed.*2d 1669 (1960), when the Court rejected the so-called "silver platter" doctrine, thereby precluding evidence unlawfully seized by state police from being used in federal prosecutions. *Id.* at 208, 80 *S.Ct.* at 1439, 4 *L.Ed.*2d at 1672. Ultimately, in ***137** *Mapp v. Ohio, supra,* 367 *U.S.* 643, 81 *S.Ct.* 1684, 6 *L.Ed.*2d 1081, the Court overruled *Wolf.* Recognizing "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies," the Court held that the exclusionary rule, as "an essential part of both the Fourth and Fourteenth Amendments," was enforceable against the states through the due process clause. *Id.* at 655–57, 81 *S.Ct.* at 1691–93, 6 *L.Ed.*2d at 1090–91.[25]

Since *Mapp,* however, the scope of the exclusionary rule has been steadily eroded. In *Alderman v. United States,* 394 *U.S.* 165, 89 *S.Ct.* 961, 22 *L.Ed.*2d 176 (1969), the Court held that defendants whose fourth-amendment rights had not been violated ****845** did not have standing to object to

evidence obtained in violation of the rights of others. The Court for the first time advanced the view that application of the exclusionary rule should depend on a cost-benefit analysis: "[W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Id.* at 174–75, 89 *S.Ct.* at 967, 22 *L.Ed.*2d at 187.

Another significant incursion occurred in *United States v. Calandra,* 414 *U.S.* 338, 94 *S.Ct.* 613, 38 *L.Ed.*2d 561 (1974), where a divided Court held that a grand-jury witness could not invoke the rule to refuse to answer questions based on evidence seized pursuant to a defective search warrant. Holding that ***138** the purpose of the rule "is not to redress the injury to the privacy of the search victim [but rather] to deter future unlawful police conduct," *id.* at 347, 94 *S.Ct.* at 619, 38 *L.Ed.*2d at 571, the Court declined to apply the rule in a context that "would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury," *id.* at 351–52, 94 *S.Ct.* at 621, 38 *L.Ed.*2d at 573.

Subsequent to *Calandra* the Court has invoked the same balancing test to permit illegally-seized evidence to be used during cross-examination to impeach the defendant's testimony, *United States v. Havens,* 446 *U.S.* 620, 627–28, 100 *S.Ct.* 1912, 1916–17, 64 *L.Ed.*2d 559, 566 (1980), and to admit into evidence in a federal civil tax proceeding wagering records that had been seized by state police pursuant to a defective search warrant, *United States v. Janis,* 428 *U.S.* 433, 454, 96 *S.Ct.* 3021, 3032, 49 *L.Ed.*2d 1046, 1061 (1976). In *United States v. Peltier,* 422 *U.S.* 531, 95 *S.Ct.* 2313, 45 *L.Ed.*2d 374 (1975), the Court found the exclusionary rule to be unavailable to the defendant in a narcotics prosecution by declining to give retroactive effect to an earlier decision holding warrantless automobile searches by the border patrol to be violative of the fourth amendment: "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge * * * that the search was unconstitutional under the Fourth Amendment." *Id.* at 542, 95 *S.Ct.* at 2320, 45 *L.Ed.*2d at 384. Invoking the same cost-benefit analysis, the Court declined to afford federal habeas corpus relief to a state prisoner who had a "full and fair opportunity" to litigate his fourth-amendment claim in a state criminal proceeding. *Stone v. Powell,* 428 *U.S.* 465, 493–94, 96 *S.Ct.* 3037, 3051–52, 49 *L.Ed.*2d 1067, 1087–88 (1976).

Despite the Court's gradual compression of the scope of the exclusionary rule, no decision prior to *United States v. Leon* expressly contradicted the established principle that evidence ***139** illegally obtained was inadmissible in the government's case-in-chief in criminal prosecutions. In this respect, *Leon* constitutes the most significant limitation of the exclusionary rule since its genesis in *Weeks.*

B. *United States v. Leon*

Although the holding in *Leon* is described as the "good faith exception" to the exclusionary rule, that characterization substantially understates the breadth of the Court's decision. Two passages from Justice White's majority opinion are illustrative of its potential scope:

> We * * * conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a *case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.*
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> —
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> We have now re-examined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated ****846** search warrant. Our conclusion is that the rule's purposes will only rarely be served by applying it in such circumstances. [468 *U.S.* at 918, 926, 104 *S.Ct.* at 3419, 3423, 82 *L.Ed.*2d at 695, 700 (emphasis added).]

According to Justice White's formulation, in suppression cases involving warrants the application of the exclusionary rule will be the exception, and recognition of the good-faith "exception" will be the prevailing standard.

In *Leon,* searches were made of defendants' persons, residences, and automobiles by police officers who relied on a facially valid search warrant issued by a California superior court judge. Large quantities of drugs were discovered during the course of the searches. Defendants were indicted by a federal grand jury and were charged with conspiracy to possess and distribute cocaine as well as other substantive offenses. Motions to suppress the evidence seized pursuant to the warrant were filed. The government argued that the extensive search-warrant application, prepared by a police officer experienced in narcotics investigations and reviewed

by several deputy district attorneys, adequately established probable cause. The application relied in part on a stale tip from an informant of unproven reliability, but was supplemented by the facts gleaned ***140** from substantial police surveillance of the premises to be searched. The federal district court concluded that the warrant had been issued without probable cause. The court acknowledged that the officer conducting the search had relied in good faith on the warrant but declined the government's suggestion that it recognize an exception to the exclusionary rule. *Id.* at 904, 104 *S.Ct.* at 3411, 82 *L.Ed.*2d at 686.

A divided panel of the Ninth Circuit affirmed, concluding that the informant's information was stale, that his reliability was unverified, and that the officer's independent investigation "neither cured the staleness nor corroborated the details of the informant's declarations." *Id.* at 904, 104 *S.Ct.* at 3411, 82 *L.Ed.*2d at 686. The Court of Appeals also declined to establish a good-faith exception to the exclusionary rule.

The Government's petition for *certiorari* did not seek review of the lower court's decision that probable cause for the warrant had not been established. The Supreme Court's grant of *certiorari* was limited to the issue advanced by the Government: " '[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good faith reliance on a search warrant that is subsequently held to be defective.' " *Id.* at 905, 104 *S.Ct.* at 3412, 82 *L.Ed.*2d at 686–87.[26]

The major premise of the Court's holding in *Leon* is that the exclusionary rule is not required by the fourth amendment but rather operates as " 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of ***141** the person aggrieved.' " 468 *U.S.* at 906, 104 *S.Ct.* at 3412, 82 *L.Ed.*2d at 687 (quoting*United States v. Calandra,* 414 *U.S.* 338, 348, 94 *S.Ct.* 613, 620, 38 *L.Ed.*2d 561 (1974)). The opinion observes that in view of the rule's function as a deterrent of police misconduct, its application in particular cases "must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a ****847** detached and neutral magistrate that ultimately is found to be defective." *Id.* at 906–07, 104 *S.Ct.* at 3412–13, 82 *L.Ed.*2d at 688.

The majority, after citing examples of the Court's prior application of the cost-benefit analysis to the exclusionary rule, concluded that there is little likelihood that the exclusion of evidence obtained pursuant to a subsequently invalidated search warrant will have a deterrent effect on law-enforcement officers:

> One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or "magistrate shopping" and thus promotes the ends of the Fourth Amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. We find such arguments speculative.
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> But even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.
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> —
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> This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." Penalizing the ***142** officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. [*Id.* at 918–21, 104 *S.Ct.* at 3419–20, 82 *L.Ed.*2d at 695–97 (quoting *Stone v. Powell,* 428 *U.S.* 465, 498, 96 *S.Ct.* 3037, 49 *L.Ed.*2d 1067).]

Because the application of the rule is unlikely to deter police misconduct when an officer has relied in good faith on an invalid warrant, the Court concluded that there are no "benefits" to suppression that justify the substantial "costs" of excluding the evidence. Accordingly, the Court held that "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 926, 104 *S.Ct.* at 3423, 82 *L.Ed.*2d at 700–01.

Justice Blackmun, emphasizing what he described as the "unavoidably provisional nature of [the] decision[s]," *id.* at 927, 104 *S.Ct.* at 3424, 82 *L.Ed.*2d at 701, concurred with the majority but cautioned that experience with the good-faith exception might require the Court to reconsider its holding:

> [T]he assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct ****848** demands no less. [*Id.* at 928, 104 *S.Ct.* at 3424, 82 *L.Ed.*2d at 702.]

Justice Brennan, dissenting, sharply attacked the majority's view that the fourth amendment's mandate is limited to the prohibition of illegal searches and does not require that the courts exclude the evidence obtained. In his view, there exists an inextricable relationship between the admission of illegally obtained evidence and an unlawful search and therefore, "by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment." *Id.* at 933, ***143** 104 *S.Ct.* at 3432, 82 *L.Ed.*2d at 705. Summarizing his basic disagreement with the majority he observed that

> [t]he Court evades this principle by drawing an artificial line between the constitutional rights and responsibilities that are engaged by actions of the police and those that are engaged when a defendant appears before the courts. According to the Court, the substantive protections of the Fourth Amendment are wholly exhausted at the moment when police unlawfully invade an individual's privacy and thus no substantive force remains to those protections at the time of trial when the government seeks to use evidence obtained by the police.
>
> I submit that such a crabbed reading of the Fourth Amendment casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme. For my part, "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures. The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures. [*Id.* at 935, 104 *S.Ct.* at 3433, 82 *L.Ed.*2d at 706.]

Because of this fundamental difference with the majority as to the scope of the fourth amendment, Justice Brennan rejected the concept that the exclusionary rule's sole purpose is "deterrence" and that its application in particular cases depends on an empirical analysis that attempts to compare the "cost" and "benefits" of excluding illegally-seized evidence:

> By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics. The extent of this Court's fidelity to Fourth Amendment requirements, however, should not turn on such statistical uncertainties. I share the view, expressed by Justice Stewart for the Court in Faretta v California, that "[p]ersonal liberties are not based on the law of averages." Rather than seeking to give effect to the liberties secured by the Fourth Amendment through guesswork about deterrence, the Court should restore to its proper place the principle framed 70 years ago in Weeks that an individual whose privacy has been invaded in violation of the Fourth Amendment has a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained. [*Id.* at 943, 104 *S.Ct.* at 3438, 82 *L.Ed.*2d at 712 (citations omitted).]

In a separate dissent, Justice Stevens emphasized that the majority's "good faith" exception, in according a preferred status to evidence seized in reliance on an invalid warrant, ***144** directly contradicted the intentions of the framers

of the fourth amendment.[27] He characterized the adoption ****849** of the "good faith" exception as the product of "constitutional amnesia." *Id.* at 972, 104 *S.Ct.* at 3453, 82 *L.Ed.*2d at 731.

> The precise problem that the Amendment was intended to address was *the unreasonable issuance of warrants.* As we have often observed, the Amendment was actually motivated by the practice of issuing general warrants —warrants which did not satisfy the particularity and probable cause requirements. The resentments which led to the Amendment were directed at the issuance of *warrants* unjustified by particularized evidence of wrongdoing. Those who sought to amend the Constitution to include a Bill of Rights repeatedly voiced the view that the evil which had to be addressed was the issuance of warrants on insufficient evidence. As Professor Taylor has written:
>
> > "Our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches...."
>
> In short, the Framers of the Fourth Amendment were deeply suspicious of warrants; in their minds the paradigm of an abusive search was the execution of a warrant not based on probable cause. The fact that colonial officers had magisterial authorization for their conduct when they engaged in general searches surely did not make their conduct "reasonable." The Court's view that it is consistent with our Constitution to adopt a rule that it is presumptively reasonable to rely on a defective warrant is the product of constitutional amnesia. [*Id.* at 971–72, 104 *S.Ct.* at 3453, 82 *L.Ed.*2d at 730–31 (quoting T. Taylor, *Two Studies in Constitutional Interpretation* 41 (1969)).]

IV

The New Jersey Constitution of 1947, Article I, Paragraph 7

It is an established principle of our federalist system that state constitutions may be a source of "individual liberties more expansive than those conferred by the Federal Constitution." ***145** *Pruneyard Shopping Center v. Robins,* 447 *U.S.* 74, 81, 100 *S.Ct.* 2035, 2040, 64 *L.Ed.*2d 741, 752 (1980); *see Oregon v. Haas,* 420 *U.S.* 714, 718, 95 *S.Ct.* 1215, 1218–19, 43 *L.Ed.*2d 570, 575 (1975); *State v. Gilmore,* 103 *N.J.* 508, 522, 511 *A.*2d 1150 (1986); "Symposium: The Emergence of State Constitutional Law," 63 *Tex.L.Rev.* 959 (1985); Pollock, "State Constitutions as Separate Sources of Fundamental Rights," 35 *Rutgers L.Rev.* 707 (1983); "Developments in the Law—The Interpretation of State Constitutional Rights," 95 *Harv.L.Rev.* 1324 (1982); Brennan, "State Constitutions and the Protection of Individual Rights," 90 *Harv.L.Rev.* 489 (1977); Note, "The New Jersey Supreme Court's Interpretation and Application of the State Constitution," 15 *Rutgers L.J.* 491 (1984).

This Court has frequently resorted to our own State Constitution in order to afford our citizens broader protection of certain personal rights than that afforded by analogous or identical provisions of the federal Constitution. *State v. Williams,* 93 *N.J.* 39, 459 *A.*2d 641 (1983); *Right to Choose v. Byrne,* 91 *N.J.* 287, 450 *A.*2d 925 (1982); *State v. Hunt, supra,* 91 *N.J.* 338 450 *A.*2d 952; *State v. Alston,* 88 *N.J.* 211, 440 *A.*2d 1311 (1981); *State v. Schmid,* 84 *N.J.* 535, 423 *A.*2d 615 (1980), appeal dismissed *sub nom. Princeton Univ. v. Schmid,* 455 *U.S.* 100, 102 *S.Ct.* 867, 70 *L.Ed.*2d 855 (1982); *State v. Johnson,* 68 *N.J.* 349, 346 *A.*2d 66 (1975). Although the ****850** language of article I, paragraph 7 of the New Jersey Constitution is virtually identical with that of the fourth amendment, we have held in other contexts that it affords our citizens greater protection against unreasonable searches and seizures than does the fourth amendment. *See State v. Hunt, supra,* 91 *N.J.* 338, 450 *A.*2d 952 (individual has protectible interest in telephone toll billing records under article I, paragraph 7 of the New Jersey Constitution); *State v. Alston, supra,* 88 *N.J.* 211, 440 *A.*2d 1311 (possessory interest in property sufficient to confer standing to challenge validity of automobile search); *State v. Johnson, supra,* 68 *N.J.* 349, 346 *A.*2d 66 (validity of consent to search depends on knowledge of the right to refuse consent).

***146** In this case, defendant urges that we construe our state-constitutional protection against unreasonable searches and seizures to preclude recognition of the good-faith exception to the exclusionary rule established in *Leon.* The Attorney General and the Hudson County Prosecutor argue that we should follow the Supreme Court's modification of the exclusionary rule and construe article I, paragraph 7 of our Constitution in a manner consistent with the good-faith exception. Our conclusion as to which of these courses to

follow is strongly influenced by what we perceive to be the likely impact of our decision on the privacy rights of our citizens and the enforcement of our criminal laws, matters of "particular state interest" that afford an appropriate basis for resolving this issue on independent state grounds. *See State v. Hunt, supra,* 91 *N.J.* at 366, 450 *A.*2d 952 (Handler, J., concurring) ("A state constitution may also be employed to address matters of particular state interest.")

The State interest in the resolution of the issue before us is clarified to some extent by a historical perspective. Although our Constitution of 1776 did not include provisions equivalent to the Bill of Rights,[28] this was remedied in our Constitution of 1844, which incorporated a protection against unreasonable searches and seizures virtually identical to the fourth amendment and to article I, paragraph 7 of the 1947 Constitution. ***147** *N.J. Const. of 1844* art. VI, para. 6; *State v. Macri, supra,* 39 *N.J.* at 256, 188 *A.*2d 389; *Eleuteri v. Richman,* 26 *N.J.* 506, 511, 141 *A.*2d 46, *cert. denied,* 358 *U.S.* 843, 79 *S.Ct.* 52, 3 *L.Ed.*2d 77 (1958).

Prior to the Supreme Court's decision in *Mapp v. Ohio, supra,* 367 *U.S.* 643, 81 *S.Ct.* 1684, 6 *L.Ed.*2d 1081, New Jersey did not apply the exclusionary rule, adhering instead to a policy decision that "competent proof shall be available for the prosecution of the offense notwithstanding illegality in the seizure." *Eleuteri v. Richman, supra,* 26 *N.J.* at 509–10, 141 *A.*2d 46; *see State v. Alexander,* 7 *N.J.* 585, 594, 83 *A.*2d 441 (1951), *cert.* denied, 343 *U.S.* 908, 72 *S.Ct.* 638, 96 *L.Ed.* 1326 (1952); *State v. Guida,* 118 *N.J.L.* 289, 297, 192 *A.* 445 (Sup.Ct.1937), aff'd, 119 *N.J.L.* 464, 196 *A.* 711 (E. & A. 1938); *State v. Merra,* 103 *N.J.L.* 361, 137 *A.* 575 (E. & A. 1927); *State v. Cortese,* 104 *N.J.L.* 447, 139 *A.* 923 (E. & A. 1927), aff'g, 4 *N.J. Misc.* 683, 134 *A.* 294 (Sup.Ct.1926); *State v. Lyons,* 99 *N.J.L.* 301, 122 *A.* 758 (E. & A. 1923).

It is also noteworthy that during the Constitutional Convention of 1947 an amendment to article I, paragraph 7 was ****851** proposed that would have incorporated the exclusionary rule into the Constitution: "Nothing obtained in violation thereof shall be received into evidence." Although the amendment was defeated, the debate included discussion of both the merits of the federal rule and the propriety of incorporating the rule into the constitutional guarantee. In his opinion in *Eleuteri v. Richman, supra,* Chief Justice Weintraub, an outspoken opponent of the exclusionary rule, accurately summarized the Convention proceedings:

> The issue was debated, with specific reference to the merits of the federal rule. One delegate added that in any event he questioned the advisability of incorporating an answer either way in organic law. The amendment was defeated by a vote of 46 to 25. 1 *Convention Proceedings Record,* 598, 608. We do not infer that the delegates intended thereby to embed our case law, but it is equally clear that the rule of exclusion is not the unmistakable wake of the constitutional provision. [26 *N.J.* at 511, 141 *A.*2d 46.]

This Court first had occasion to apply the exclusionary rule in *State v. Valentin,* 36 *N.J.* 41, 174 *A.*2d 737 (1961). There, the defendant's motion to suppress evidence in a prosecution alleging that he possessed a shotgun without a permit had been denied without ***148** any offer of proof by the prosecutor as to the legality of the search and seizure.[29] While the appeal was pending before us, the Supreme Court decided *Mapp v. Ohio, supra,* holding the exclusionary rule applicable to the states through the due process clause of the fourteenth amendment. Accordingly, we remanded the matter to the trial court to permit reconsideration of the suppression motion in the context of "all relevant proof on the new issue generated by *Mapp.*" 36 *N.J.* at 44, 174 *A.*2d 737.

Since *State v. Valentin, supra,* the exclusionary rule has become imbedded in our jurisprudence. During the past twenty-five years it has consistently been applied to exclude from the State's case-in-chief evidence illegally obtained through warrantless searches or in reliance on defective warrants. *E.g. State v. Valencia,* 93 *N.J.* 126, 141, 459 *A.*2d 1149 (1983) (evidence obtained as a result of telephone-authorized search would be suppressed where State failed to prove minimal procedural requirements to assure reliability); *State v. Fariello, supra,* 71 *N.J.* 552, 366 *A.*2d 1313 (requiring suppression of evidence of narcotics possession where affidavit was insufficient to show probable cause and issuing judge made no transcription or summary of officer's testimony); *State v. Macri, supra,* 39 *N.J.* at 265–66, 188 *A.*2d 389 (mandating suppression of illegally seized evidence of bookmaking activities and rejecting State's argument in support of a good faith exception: "The good faith of the officer would not be sufficient in a federal proceeding nor should it be viewed as sufficient here."); *State v. Moriarity,* 39 *N.J.* 502, 189 *A.*2d 210 (1963) (evidence that defendant conducted bookmaking and lottery was suppressed where affidavit did not show probable cause and officer's testimony to issuing judge not given under oath).[30]

****852** ***149** We also take note that our legislature in 1968 incorporated the exclusionary rule into its enactment of the New Jersey Wiretapping and Electronic Surveillance Control Act, *N.J.S.A.* 2A:156A–1 to –26. That statute expressly provides for suppression of evidence derived from any intercepted wire or oral communication if the interception was unauthorized or inconsistent with the statute, or if the order of authorization was insufficient. *N.J.S.A.* 2A:156A–21. Significantly, an officer's good-faith reliance on a court order authorizing the interception constitutes a defense to any civil, criminal or administrative proceeding instituted against the officer, *N.J.S.A.* 2A:156A–25, but does not avoid the suppression of evidence derived from an improper interception. *N.J.S.A.* 2A:156A–21.

***150** New Jersey's law-enforcement agencies have taken steps to enhance the quality of the search-warrant application process in order to assure compliance with the constitutionally-mandated probable-cause standard. Two recent initiatives are of particular significance. In July 1984 a special county grand jury issued a presentment concerning deficiencies in the procedure followed by a local police department in applying for and executing a search warrant resulting in the search and seizure of property without probable cause. The presentment noted that "the execution of a search warrant is the most intrusive invasion of privacy permitted by government agents," and set forth the grand jury's finding "that the group of citizens affected by the execution of the warrants * * * did not receive the protection of law afforded by the Constitution." Presentment, Special Union County Grand Jury, Panel No. 6, March Stated Session 1984 Term.

Prompted in part by the findings of the grand jury presentment, the Attorney General and the County Prosecutors Association adopted in February 1985 a joint policy statement intended to achieve the "institutionalization of a systematic search warrant review procedure in New Jersey."[31] The policy statement, which applies to all State, County, and municipal officers, requires that "[a]ll applications for search warrants shall be reviewed by the Attorney General or his designees, or the appropriate County Prosecutor, or his designees, prior to their submission to the Courts for authorization." The Court has been informed, in response to its direct inquiry, that this policy statement has been implemented without exception in every county in the State.[32] We are also cognizant of the significant and recurring search warrant training programs offered regularly to municipal court judges throughout the state. We ***151** assume that the likely effect of such a statewide policy requiring competent legal review of search warrant applications, combined with the training programs for municipal judges, would be to enhance the extent of compliance with the probable-cause standard and minimize the incidents ****853** of suppression of evidence because of defectively-issued warrants.[33]

In this connection, a survey performed by the Administrative Office of the Courts with respect to suppression motions in ten ***152** counties during the six-month period of December 1, 1985, to May 31, 1986, reveals that of the 1082 motions filed, 540 motions have been resolved. Of these, 38 were granted and all of the granted motions involved warrantless searches. In addition, the study examined all of the granted suppression motions in three of the ten counties for an additional six-month period and in two additional counties during a twelve-month period. Out of 44 granted motions, only one suppression order involved a search warrant defective for lack of probable cause. Administrative Office of the Courts, Report on Suppression Motions, July 30, 1986.[34] This survey was not statewide and examined a limited sample of suppression motions. Nevertheless, its results suggest that currently in New Jersey the grant of motions to suppress evidence obtained pursuant to defective search warrants is relatively uncommon and apparently poses no significant obstacle to law-enforcement efforts.

We note that one of the most frequently recurring themes in the criticism that has been directed at the *Leon* decision[35] is that it will tend to undermine the motivation of law-enforcement officers to comply with the constitutional requirement of probable cause. Professor LaFave makes the argument cogently:

> Under the pre-*Leon* version of the exclusionary rule, police had finally come to learn that it was not enough that they had gotten a piece of paper called a warrant. Because that warrant was subject to challenge at the later motion to suppress, it was important to the police that the warrant be properly issued or that the warrant request be turned down at a time when it might be possible to acquire necessary additional information without compromising the investigation. Consequently, there had developed in many localities the very sound practice of going ****854** through the warrant-issuing process with the greatest of care, often by having the affidavit reviewed by individuals other than the magistrate. * * * But under *Leon* there is no

> reason to go through such cautious procedures and every reason not to. Why take the risk that some conscientious prosecutor or police supervisor will say the application is insufficient when, if ***153** some magistrate can be induced to issue a warrant on the basis of it, the affidavit is thereafter virtually immune from challenge? There is thus no escaping the fact that, as the *Leon* dissenters put it, the "long-run effect" of that case "unquestionably will be to undermine the integrity of the warrant process." [1 LaFave, *Search and Seizure, supra* (1986 Pocket Part), § 1.2, at 20.][36]

We find this criticism of the "good-faith" exception to be persuasive. One obvious consequence of the application of the exclusionary rule in New Jersey has been the encouragement of law-enforcement officials to comply with the constitutionally-mandated probable-cause standard in order to avoid the suppression of evidence. The *Leon* rule avoids suppression of evidence even if the constitutional standard is violated, requiring only that the officer executing the defective warrant have an objectively reasonable basis for relying on it. Whatever else may be said for or against the *Leon* rule, the good-faith exception will inevitably and inexorably diminish the quality of evidence presented in search-warrant applications. By eliminating any cost for noncompliance with the constitutional requirement of probable cause, the good-faith exception assures us that the constitutional standard will be diluted.

We note that Justice White, author of the *Leon* opinion, expressed concerns very similar to these in his dissent in *I.N.S. v. Lopez-Mendoza,* 468 *U.S.* 1032, 104 *S.Ct.* 3479, 82 *L.Ed.*2d 778 (1984), decided the same day as *Leon,* a case in which the Court held that the exclusionary rule need not be applied in civil deportation proceedings. Responding to the majority's observation that the training of immigration officers in fourth-amendment principles made application of the exclusionary rule unnecessary, Justice White noted:

> [I]mmigration officers are instructed and examined in Fourth Amendment law, and it is suggested that this education is another reason why the exclusionary rule is unnecessary. A contrary lesson could be discerned from the existence of these programs, however, when it is recalled that they were instituted during "a legal regime in which the cases and commentators uniformly sanctioned the ***154** invocation of the rule in deportation proceedings." Thus, rather than supporting a conclusion that the exclusionary rule is unnecessary, the existence of these programs instead suggests that the exclusionary rule has created incentives for the agency to ensure that its officers follow the dictates of the Constitution. Since the deterrent function of the rule is furthered if it alters either "the behavior of individual law enforcement officers or the policies of their departments," it seems likely that it was the rule's deterrent effect that led to the programs to which the Court now points for its assertion that the rule would have no deterrent effect. [*Id.* at 1055, 104 *S.Ct.* at 3492–93, 82 *L.Ed.*2d at 796 (quoting *Leon, supra,* 468 *U.S.* 897, 104 *S.Ct.* 3405, 82 *L.Ed.*2d 677).][37]

Our view that the good-faith exception will ultimately reduce respect for and compliance with the probable-cause standard that we have steadfastly enforced persuades us that there is a strong state interest that would be disserved by adopting the *Leon* rule. We acknowledge the virtue of consistency between federal and state ****855** courts in the administration of the criminal laws, although we note that from the decision in *Weeks, supra,* in 1914 until *Mapp v. Ohio, supra,* in 1961, the exclusionary rule applied in the federal courts but was not constitutionally compelled in the states. Although there is irony in the reversal of these roles, there is ample precedent for the view that uniformity between federal and state courts is not essential with regard to the exclusionary rule. *See Wolf v. Colorado, supra,* 338 *U.S.* at 28–33, 69 *S.Ct.* at 1361–64, 93 *L.Ed.* at 1786–88. In this connection, we observe that *Leon* has generated significant debate in other jurisdictions.[38]

***155** Ultimately, we focus on the inevitable tension between the proposed good-faith exception and the guarantee contained in our State Constitution that search warrants "shall not issue except upon probable cause." In the twenty-five years during which we have applied the exclusionary rule in New Jersey, we have perceived no dilution of our probable-cause standard; rather, efforts to comply with the constitutional mandate have been enhanced. Nor do we perceive that application of the exclusionary rule has in any significant way impaired the ability of law-enforcement officials to enforce the criminal laws. The statistical evidence is to the contrary.

***156** We recognize that the exclusionary rule may pose a greater obstacle to law enforcement in other jurisdictions where non-lawyer magistrates are authorized to issue search warrants and police officers' affidavits are not subjected to review by trained prosecutors. *Illinois v. Gates, supra,* 462 *U.S.* at 235, 103 *S.Ct.* at 2330–31, 76 *L.Ed.*2d at 546; *Shadwick v. City of Tampa,* 407 *U.S.* 345, 92 *S.Ct.* 2119, 32 *L.Ed.*2d 783 (1972); *see* Wasserstrom & Mertens, *supra* note

26, at 106–11. The incidence of defective search warrants in other jurisdictions may partially explain the Supreme Court's ****856** adoption of a less restrictive *federal* standard for testing the admissibility of evidence thus obtained. Plainly, the same considerations do not apply in New Jersey.

In the face of evidence that New Jersey's criminal justice system is not impaired by the constitutional guarantee of probable cause, our dissenting colleague nevertheless urges us to adopt the good-faith exception promulgated in *Leon* because she perceives "that the public will view the good-faith exception to the exclusionary rule as a sensible accommodation between protecting an individual's constitutional rights and punishing the guilty." *Post* at 873. We have little doubt that the dissent is accurate in this assessment, particularly at a time when widespread drug use and drug-related law enforcement are issues that dominate the national consciousness. The public is likely to have little short-term tolerance for any rule that encumbers even minimally the prosecution of drug-related crime.

Our concern, however, is with the Constitution and with the basic and fundamental guarantees that that document was intended to afford to all our citizens, particularly in times of public ferment. In our view, the citizen's right to be free from unreasonable searches and seizures conducted without probable cause is just such a fundamental principle, to be preserved and ***157** protected with vigilance. In our tripartite system of separate governmental powers, the primary responsibility for its preservation is that of the judiciary.

The exclusionary rule, by virtue of its consistent application over the past twenty-five years, has become an integral element of our state-constitutional guarantee that search warrants will not issue without probable cause. Its function is not merely to deter police misconduct. The rule also serves as the indispensable mechanism for vindicating the constitutional right to be free from unreasonable searches.[39] Because ****857** we believe that the good-faith exception to the exclusionary rule adopted in ***158** *Leon* would tend to undermine the constitutionally-guaranteed standard of probable cause, and in the process disrupt the highly effective procedures employed by our criminal justice system to accommodate that constitutional guarantee without impairing law enforcement, we decline to recognize a good-faith exception to the exclusionary rule.

In reaching this result, we can hardly ignore the ebb and flow of federal search-and-seizure law during this century. The ***159** reversal of the *Wolf* decision in *Mapp v. Ohio,* the impact of *Gates* on the *Aguilar-Spinelli* test, and the erosion of the exclusionary rule during the past two decades counsel us against the assumption that the decision in *Leon* is to be a permanent star in the judicial firmament. Justice Blackmun, concurring in *Leon,* cautioned us as to the "unavoidably provisional nature" of the decision, 468 *U.S.* at 927, 104 *S.Ct.* at 3424, 82 *L.Ed.*2d at 701, and warned that if "the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here," *id.* at 928, 104 *S.Ct.* at 3424, 82 *L.Ed.*2d at 702. We suspect that Justice Blackmun's forebodings may be prophetic indeed. In our view, erosion of the probable-cause guarantee will be a corollary to the good-faith exception. We think it quite possible that the damage to the constitutional guarantee may reach such a level as to cause the Court to reconsider its experiment with the fourth amendment.

We see no need in New Jersey to experiment with the fundamental rights protected by the fourth-amendment counterpart of our State Constitution. We will not subject the procedures that vindicate the fundamental rights guaranteed by article I, paragraph 7 of our State Constitution—procedures that have not diluted the effectiveness of our criminal justice system—to the uncertain effects that we believe will inevitably accompany the good-faith exception to the federal exclusionary rule.

The judgment of the Appellate Division is affirmed.

HANDLER, J., concurring.

Defendant, Ottavio Novembrino, was indicted for possession of controlled dangerous substances and possession of controlled ***160** dangerous substances with intent to distribute. He filed a motion to suppress evidence and, as noted in the majority opinion, the suppression hearing resulted in sharply conflicting accounts of the circumstances surrounding defendant's arrest and the subsequent search of his service station. The trial court, however, credited the State's evidence, as did the Appellate Division, ****858** and, now, this Court. In spite of the fact that every judge who reviewed the issuance of the search warrant and examined the evidence surrounding the search and seizure in this case accepted the State's version, each reached the same conclusion—that the State failed to demonstrate probable cause to justify the issuance of the search warrant.

I concur in the unanimous determination that there was no probable cause in this case. Further, I join the majority in its conclusion that evidence seized pursuant to a search warrant issued without probable cause must be excluded notwithstanding the executing officer's subjective good faith in relying upon the warrant; in a case such as this, the judicially-devised exclusionary rule must be applied to vindicate the underlying constitutional interest. However, I break rank with the Court when it expresses an additional reason for reaching this result, namely, that the exclusionary rule itself is a constitutional right directly protected under the State Constitution.

I.

Before explaining my reasons for disagreeing with the majority as to the conceptual basis for applying the exclusionary rule, some observations concerning the antecedent issues in this case are pertinent. These relate to both the non-controverted question of probable cause and the highly-controverted issue of the relevance of the executing officer's subjective good faith.

As to probable cause, in view of the unanimity of opinion, I see no necessity for the Court's extensive exposition of this issue. I would be content in this case simply to adopt the sound position of the Appellate Division that the affidavit and circumstances ***161** surrounding the issuance of the search warrant failed to demonstrate adequate probable cause:

> The affidavit here involved simply revealed that a police informant concluded for unknown reasons that defendant was a drug dealer, that a person previously arrested for possession of cocaine was seen at defendant's gas station engaged in some unspecified activities which caused a detective, whose education, training and experiences are unknown, to conclude that criminal activities in the form of violations of Title 24 were taking place at the gas station. The totality of the circumstances spelled out in the affidavit failed to contain a single objective fact tending to engender a "well grounded suspicion" that a crime was being committed. * * * We conclude, therefore, that probable cause was not established. [*State v. Novembrino,* 200 *N.J.Super.* 229, 236, 491 *A.*2d 37 (1985) (citations omitted).]

This is so particularly in light of the Court's ruling that a totality-of-the-circumstances formula analogous to that set forth in *Illinois v. Gates,* 462 *U.S.* 213, 103 *S.Ct.* 2317, 76 *L.Ed.*2d 527 (1983), is now to be used to assess the validity of search warrants under the probable cause standard set forth in Article I, paragraph 7 of the New Jersey Constitution. *Ante* at 836.

With respect to the relevance of the executing police officer's subjective good faith, the Court rejects the proposition that if probable cause for the issuance of a search warrant is lacking, seized evidence should nevertheless be admissible on the basis of the good-faith exception recognized by the Supreme Court in *United States v. Leon,* 468 *U.S.* 897, 104 *S.Ct.* 3405, 82 *L.Ed.*2d 677 (1984). I concur in this determination.

I agree with the majority that the good-faith test effectively dilutes probable cause—the indispensable constitutional foundation for a reasonable search and seizure—by eliminating the necessity for demonstrating reasonable grounds to make a search before evidence obtained therefrom will be admissible in evidence. This conclusion is based on the fact that operation of the exclusionary rule serves to deter not only intentional official misconduct but also mistaken official misdeeds.

In addition, the test proffered under *Leon* is not simply subjective good faith as ****859** such. Rather, the test is objective-subjective good faith: whether the actual, "subjective" good faith of the executing police officer itself can be considered "objectively" ***162** reasonable as a basis for undertaking—and validating—a search in reliance upon the warrant. We have generally eschewed the relevance or significance of the actual state of mind of the executing officer. In recent cases we have been emphatic and consistent in our adherence to the proposition that probable cause must be demonstrated by reference to objective circumstances —what an informed, trained and reasonably experienced police officer under all of the circumstances would have understood in terms of whether there is probable cause. *See State v. Bruzzese,* 94 *N.J.* 210, 463 *A.*2d 230 (1983) (police officer's search and seizure would be considered reasonable only if it conformed to objectively reasonable police standards); *see also State v. Guerra,* 93 *N.J.* 146, 152, 459 *A.*2d 1159 (1983) ("if the validity of a search can be sustained independently on *objective grounds demonstrating reasonableness,* the existence of other defects that do not derogate from the *overall objective reasonableness of the search* or impugn the integrity of the judicial process should not be relied upon to invalidate the search.") (emphasis

added); *State v. Ercolano,* 79 *N.J.* 25, 71, 397 *A.*2d 1062 (1979) (dissenting opinion).

The problem is that the objective-subjective good faith test of *Leon* is inconsistent with the requirement of objective probable cause. As put by Justice Brennan dissenting in *United States v. Leon:*

> it is virtually inconceivable that a reviewing court, when faced with a defendant's motion to suppress, could first find that a warrant was invalid, under the new [*Illinois v.*] *Gates* standard, but then, at the same time, find that a police officer's reliance on such an invalid warrant was nevertheless "objectively reasonable" under the [*Leon*] test. Because the two standards overlap so completely, it is unlikely that a warrant could be found invalid under *Gates* and yet the police reliance upon it could be seen as objectively reasonable; otherwise, we would have to entertain the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant." (citing Kamisar, *supra,* note 5, at 588–89; Wasserstrom, "The Incredible Shrinking Fourth Amendment," 21 *Am.Crim.L.Rev.* 257 (1984); LaFave, "The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,' " 43 *U.Pitt.L.Rev.* 307, 333–59 (1982). [468 *U.S.* at 958–59, 104 *S.Ct.* at 3445–46, 82 *L.Ed.*2d at 721–22.]

Justice Brennan concluded that the subjective good-faith test would virtually eviscerate the constitutional requirement of ***163** probable cause. I could not agree more, and on this point I am confident that the majority of this Court concurs, particularly in view of its extended emphasis upon the paramountcy of probable cause as the quintessential basis for a reasonable search and seizure and its rejection of the objective-subjective good faith test of *Leon. Ante* at 856.

II.

My major difference from the Court has not to do with its test of probable cause or its rejection of the good-faith exception. Therefore, under the circumstances of this case, I agree with the Court's application of the exclusionary rule. The effect of our judgment in this case is to sanction the exclusion of evidence derived from a search and seizure based upon a warrant that was not supported by probable cause—on objective grounds—notwithstanding the subjective good faith of the executing officer in relying upon the search warrant.

My departure from the Court is occasioned by its characterization of the exclusionary rule as it is applied in this case. The majority has decided that the exclusionary rule—the exclusion of evidence derived from an objectively unreasonable search and seizure—itself is a constitutional right. I do not believe that it is a constitutional right as such. Rather, it is a ****860** remedial rule that is ancillary or incidental to the central constitutional right of the citizen to be free from unreasonable searches and seizures. That the exclusionary rule is a remedial rule ancillary to the constitutional right in no way denigrates the singular importance of the rule or detracts from its legal potency. *See State v. Hartley,* 103 *N.J.* 252, 290, 511 *A.*2d 80 (1986) (concurring opinion). I am satisfied that the exclusionary rule is vitally necessary to protect the underlying constitutional right on the part of individuals to be free from unreasonable searches and seizures and should be continued as a court-created remedy as a matter of our state common law. While this conceptual disagreement has no practical consequences in this case, it may have enormous ramifications in other situations.

***164** I am constrained to state my difference from the Court because I cannot subscribe to its analysis or reasoning concerning the constitutional basis of the exclusionary rule. The Court's determination is borne out neither by the decisional law that has served to explicate our legal traditions relative to the exclusionary rule, nor by state constitutional history relevant to the exclusionary rule, nor by considerations of a sound public policy—factors that we generally consider in expounding and interpreting our state constitution. *State v. Gilmore,* 103 *N.J.* 508, 511 *A.*2d 1150 (1986); *State v. Williams,* 93 *N.J.* 39, 459 *A.*2d 641 (1983); *State v. Hunt,* 91 *N.J.* 338, 450 *A.*2d 952 (1982) (concurring opinion).

A.

A review of our decisional law shows that, even after *Weeks v. United States,* 232 *U.S.* 383, 34 *S.Ct.* 341, 58 *L.Ed.* 652 (1914), in which the exclusionary rule was first applied under the fourth amendment, New Jersey did not apply the exclusionary rule. Rather, this state adhered to the rule that "competent proof shall be available for the prosecution of the offense notwithstanding illegality in the seizure." *Eleuteri v. Richman,* 26 *N.J.* 506, 509–10, 141 *A.*2d 46 (1958); *see State v. Alexander,* 7 *N.J.* 585, 594, 83 *A.*2d 441 (1951), *cert. denied,* 343 *U.S.* 908, 72 *S.Ct.* 636, 96 *L.Ed.* 1326 (1952); *State v.*

Guida, 119 *N.J.L.* 464, 196 *A.* 711 (E. & A.1938); *State v. Merra,* 103 *N.J.L.* 361, 137 *A.* 575 (E. & A.1927); *State v. Cortese,* 104 *N.J.L.* 447, 139 *A.* 923 (E. & A.1927), aff'g 4 *N.J.Misc.* 683, 134 *A.* 294 (Sup.Ct.1926); *State v. Lyons,* 99 *N.J.L.* 301, 122 *A.* 758 (E. & A.1923); *State v. MacQueen,* 69 *N.J.L.* 522, 528, 55 *A.* 1006 (1903).

In 1958, we had an opportunity to re-examine the constitutional significance of this settled rule. In *Eleuteri v. Richman, supra,* 26 *N.J.* 506, 141 *A.*2d 46, search warrants were invalidated because the issuing magistrate was without power to authorize a search beyond the territorial limits of his court. *Id.* at 508, 141 *A.*2d 46. The issue was whether the fruit of that unlawful search was nevertheless admissible in evidence. The Court observed that:

> The exclusionary rule rests upon two propositions. The first is that government should not stoop to the "dirty business" of a criminal in order to catch ***165** him. The second is that civil and criminal remedies against the offending officer are as a practical matter ineffective, and hence the rule of exclusion is the only available remedy to protect society from the excesses which led to the constitutional right. *Id.* at 512, 141 *A.*2d 46.

And further:

> the exclusionary rule has the role of a *deterrent*—a device to compel respect for the [constitutional] guarantee by removing an incentive to disregard it. *It is calculated to prevent; not to repair.* The postulate is an enforcement official indifferent to basic rights. *Id.* at 513, 141 *A.*2d 46 (emphasis added).

Even after *Mapp v. Ohio,* 367 *U.S.* 643, 81 *S.Ct.* 1684, 6 *L.Ed.*2d 1081 (1961), by which the federal adoption of the exclusionary rule as a remedial device to vindicate the fourth amendment guaranty against unreasonable searches became applicable to states under the fourteenth amendment, ****861** we consistently recognized that the exclusionary rule served the primary purpose of deterrence. Moreover, we initially held that the rule should be applied only to redress culpable police misconduct. *See State v. Gerardo,* 53 *N.J.* 261, 267, 250 *A.*2d 130 (1969) (holding that exclusion of evidence is not mandated by the fourth amendment, since "important as it is in our society, [it] does not call for imposition of judicial sanctions where enforcing officers have followed the law with such punctilious regard as they have here"); *State v. Zito,* 54 *N.J.* 206, 211, 254 *A.*2d 769 (1969) (holding that "the product of a search should not be suppressed when a search is made in good faith upon the strength of a statute later declared unconstitutional); *State v. Bisaccia,* 58 *N.J.* 586, 589–91, 279 *A.*2d 675 (1971). ("It is puzzling that the suppression rule was not anchored to the reason for its creation. The evil sought to be ended was insolence in office.")

The majority here asserts that at least since the decision in *State v. Valentin,* 36 *N.J.* 41, 174 *A.*2d 737 (1961), "the exclusionary rule has become imbedded in our jurisprudence." *Ante* at 851. It states that the exclusionary rule has consistently been applied to exclude from the State's case-in-chief evidence illegally obtained through warrantless searches or in reliance upon defective warrants. The cases it cites all reflect a judicial concern with, and reaction to, evidence that was seized in violation of ***166** standards and rules designed to assure the reasonableness of the search and seizure. *E.g. State v. Valencia,* 93 *N.J.* 126, 141, 459 *A.*2d 1149 (1983) (evidence obtained as a result of telephone-authorized search would be suppressed where State failed to prove minimal procedural requirements to assure reliability); *State v. Fariello,* 71 *N.J.* 552, 366 *A.*2d 1313 (1976) (requiring suppression of evidence of narcotics possession where affidavit was insufficient to show probable cause and issuing judge made no transcription or summary of officer's testimony); *State v. Moriarity,* 39 *N.J.* 502, 189 *A.*2d 210 (1963) (evidence that defendant conducted bookmaking and lottery was suppressed where affidavit did not show probable cause and officer's testimony to issuing judge not given under oath); *State v. Macri,* 39 *N.J.* 250, 265–66, 188 *A.*2d 389 (1963) (mandating suppression of illegally seized evidence of bookmaking activities and rejecting State's argument in support of a good faith exception).

It may not be amiss to characterize these decisions as "embedd[ing]" the exclusionary rule in our jurisprudence. Their significance, however, is not so much a consistent reliance upon the exclusionary rule but a judicial expansion of the scope of the rule. In effect, these decisions extend the deterrent purpose of the exclusionary rule to encompass cases of unreasonable official misconduct that was simply misguided or mistaken, as well as intentional or malicious. It cannot be overemphasized, however, that this Court, in extending and applying the exclusionary rule, has consistently and unfailingly stressed its deterrent purpose and its origins as a court-created remedy designed to discourage improper police conduct.[1] *E.g., State v.* ***167** *Gerardo, supra,* 53 *N.J.* at 267, 250 *A.*2d 130 ("The doctrine of suppression is judge-made, a device adopted upon the belief that there was no effective remedy for a violation of [the fourth amendment]. Suppression is ordered, not to rectify a wrong

already done, but to deter future violations."). The ****862** Court has *not* given similar weight to the notion that the rule is designed to make the frequently-guilty defendant constitutionally "whole" by negating the use of the fruit of an unreasonable search. Thus, while the rule is part of our "jurisprudence," it is the Court's unswerving endorsement of its deterrent purpose that accounts for this. It is therefore an exaggeration to say that the rule, though markedly broadened, has acquired constitutional stature.

It might be argued (though not by the majority) that the exclusionary rule is constitutional because it is directly related to "judicial integrity." We, however, have not subscribed to the view that "judicial integrity" is the purpose served by the exclusionary rule, although in particular cases "judicial integrity" may be threatened by certain kinds of police misconduct and itself would justify application of the rule. *See, e.g., Franks v. Delaware,* 438 *U.S.* 154, 98 *S.Ct.* 2674, 57 *L.Ed.*2d 667 (1978); *State v. Howery,* 80 *N.J.* 563, 404 *A.*2d 632 (1979) (holding that the fourth amendment requires that a defendant be allowed an opportunity to challenge the veracity of an affidavit supporting a search warrant). Just last term we reiterated the position that the function of the exclusionary rule is deterrence. In *Delguidice v. New Jersey Racing Com'n.,* 100 *N.J.* 79, 494 *A.*2d 1007 (1985), we held that "[d]eterrence of future unlawful police conduct is the 'prime purpose' of the exclusionary rule, 'if not the sole one.' " *Id.* at 85, 494 *A.*2d 1007 (citations omitted). We rejected the argument that "judicial integrity" mandates that the courts exclude all ***168** evidence that has been unlawfully seized. The Court held that in most suppression cases

> the evidence is unquestionably accurate and the wrong is complete by the time the evidence reaches the court. Therefore, the analysis is narrowed to the question of whether admitting the evidence would encourage future improper law enforcement actions.... [T]his inquiry is substantially the same as the question of whether exclusion would serve a deterrent purpose. [*Id.* at 89, 494 *A.*2d 1007 (citations omitted).]

In sum, the exclusionary rule as developed and applied in this jurisdiction has evolved from one focusing essentially on callous, willful or insolent police misbehavior to one that encompasses official misconduct reflecting no more than ignorance, mistake, or inexperience. In either of these situations, the result to the victim is the same—an objectively unreasonable search and seizure. And, therefore, the application of the rule is the same—to exclude ill-found evidence in order to discourage the offending officials. Thus, it is the judicial understanding of what is "improper" police misconduct that has changed over the years, not the purpose of the rule. The genetic thread that connects our decisions is the central design of the exclusionary rule to *deter* improper official conduct. To reiterate, the purpose is not solely or primarily to punish the offending police officer or to compensate the defendant or even to assure judicial integrity. Consequently, this stream of decisional law erodes rather than supports the foundation upon which the Court now raises the exclusionary rule to a constitutional right.

B.

The decisional law does not clearly reflect strong legal traditions that suggest the exclusionary rule is itself of constitutional stature. Hence, our decisions do not provide the basis from which to reason that the exclusionary rule has now evolved into a constitutional doctrine. Moreover, the relevant and express constitutional history in this area militates against the conclusion that the exclusionary rule itself has acquired the status of ***169** a constitutional right. On this point I agree with the analysis of the dissenting opinion. *Post* at 862.

As noted, the early prevailing rule in our jurisdiction allowed into evidence the fruits of an illegal search and seizure. *Supra* at 860. This rule of admissibility was firmly in place when the delegates to New Jersey's Constitutional Convention assembled ****863** in the summer of 1947. The constitutional provision guaranteeing the citizens' right to be free of unreasonable searches and seizures, like its federal fourth amendment counterpart, provides:

> 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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized. [*N.J. Const.* (1947) art. I, para. 7.][2]

An amendment proposed at the Convention would have added the following sentence to Article I, paragraph 7: "Nothing obtained in violation hereof shall be received into evidence." In effect, it was proposed that the exclusionary rule be made an express constitutional right. The delegates defeated the proposed amendment by a final vote of 46 to 25. *See* 1 *Convention Proceedings Record* 598–608 (August 19, 1947).

The debate leading to the defeat of the amendment included discussion of both the merits of the federal exclusionary rule and the propriety of incorporating such a rule into the constitutional guarantee. The Court in *Eleuteri v. Richman, supra,* summarized the Convention proceedings:

> The issue was debated, with specific reference to the merits of the federal rule. One delegate added that in any event he questioned the advisability of incorporating an answer either way in organic law. The amendment was defeated by a vote of 46 to 25. 1 *Convention Proceedings Record,* 598, 608. We do not infer that the delegates intended thereby to embed our case law, but it is equally clear the the rule of exclusion is not the unmistakable wake of the constitutional provision. [26 *N.J.* at 511, 141 *A.*2d 46.]

***170** It may be, as the Court in *Eleuteri* acknowledged, that the defeat of the exclusionary-rule amendment at the Constitutional Convention left the rule amenable to judicial treatment and development, perhaps even to the point of someday recognizing it as a standard of constitutional dimension. It seems equally clear, however, that our case-law has not brought us to this point. The rule remains, as it has always been, a judicial remedy. Though the rule has achieved broadened scope and application, it is designed to protect the central constitutional right of citizens to be free from unreasonable searches and seizures by deterring unlawful official conduct that otherwise undermines this constitutional right. It is thus fair to conclude that (1) the exclusionary rule is expressly not a part of the New Jersey Constitution and (2) the decisional law does not by express holdings or clear implication furnish a basis for determining that the exclusionary rule has become an integral part of the State Constitution.[3]

C.

The Court offers no reason why the judicially-fashioned exclusionary rule cannot satisfactorily be regarded as a common-law principle and remain fully efficacious in vindicating the underlying constitutional right. Indeed, rights and interests that are vital to the individual have been anchored firmly in our common law. *E.g. State v. Hartley, supra,* 103 *N.J.* 252, 511 *A.*2d 80 (privilege against self-incrimination). It therefore seems to me unwise—because unnecessary—for this Court to metamorphose an ancillary rule such as the exclusionary ****864** rule from a common-law doctrine into a constitutional right. To do so forever blocks ***171** any future development of the rule and effectively forecloses the possibility of alternative approaches that might serve to enforce the basic constitutional right.[4]

Moreover, permitting the exclusionary rule to be incorporated into our Constitution effectively prevents the other branches of government from exercising their own responsibility to protect a citizen's right to be free from unreasonable searches and seizures. For at least a generation we have, until today, expressed confidence in the role of the other branches of government with respect to the citizen's constitutional right to be secure against unlawful searches and seizures. *Compare Eleuteri v. Richman, supra,* 26 *N.J.* at 514–16, 141 *A.*2d 46 ("The judiciary, of course, is not the sole guardian of the Constitution. The executive branch is equally sworn to uphold it.") *with Delguidice v. New Jersey Racing Com'n, supra,* 100 *N.J.* at 92, 494 *A.*2d 1007 ("There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of executive and legislative branches. We find ourselves at that point in this case.") We would be remiss if we failed to comprehend that the other branches of government have direct responsibilities with respect to the effective enforcement ***172** of the constitutional guarantee against unreasonable searches and seizures.

The majority itself stresses the constructive measures taken by the Attorney General and other law enforcement authorities to adopt procedures to assure the reasonableness of searches and seizures. *Ante* at 852–853. It also quite aptly acknowledges the Legislature, which specifically incorporated the exclusionary rule into its enactment of the New Jersey Wiretapping and Electronic Surveillance Control Act, *N.J.S.A.* 2A:156A–1 to –26.[5] In providing for a statutory rule of exclusion, *N.J.S.A.* 2A:156A–21, the Legislature specifically recognized the availability of supplementary forms of relief and, significantly, provided that an officer's good faith reliance on a court order authorizing the interception constitutes a defense to any civil, criminal, or administrative proceeding instituted against the officer, *N.J.S.A.* 2A:156A–25, but does not avoid the suppression of evidence derived from an improper interception. *N.J.S.A.* 2A:156A–21. In *State v. Molinaro,* 117 *N.J.Super.* 276, 284 *A.*2d 385 (Essex Cty.Ct.1971), *rev'd on other grounds,* 122 *N.J.Super.* 181, 299 *A.*2d 750 (App.Div.1973), the court noted that: "In the adoption of the New Jersey Wiretapping and Electronic Surveillance Control Act, the New Jersey Legislature attempted to be scrupulous about the protections

which it fashioned for individual privacy." *Id.* at 287, 284 *A.*2d 385. The court then held:

> ****865** Where evidence has been seized unlawfully, suppression of that evidence at trial ordinarily follows. This doctrine of suppression is a court-authored remedy. Where, however, evidence stems from an unlawful wiretap, suppression of such evidence is the remedy selected specifically by the Legislature. *Id.* at 294, 284 *A.*2d 385. (citations omitted).

The court also stated:

> Arguably, the judiciary in a different setting could abandon or modify the exclusionary doctrine since this rule originated with the courts. It has been ***173** suggested, however, that it is also within the power of a legislative body to adopt or negate a rule of suppression. With respect to evidence derived from an unlawful electronic surveillance, the New Jersey Legislature by *N.J.S.A.* 2A:156A–21 has instituted such a rule. *Id.* at 295, 284 *A.*2d 385. (citations omitted).[6]

The Wiretapping Act instructs us that when a threatened privacy interest is deemed sufficiently important, the Legislature will not hesitate to devise effective remedies, including the exclusionary rule, to protect this interest.

The "bottom line" for the majority seems to be its despair that there can ever be any effective alternative to the exclusionary rule and, therefore, we might as well give it permanency. It is certainly fair to observe that existing alternatives to the exclusionary rule are largely inadequate. *E.g. Monroe v. Pape,* 365 *U.S.* 167, 81 *S.Ct.* 473, 5 *L.Ed.*2d 492 (1961) (An individual whose fourth amendment rights have been violated by a state law enforcement official has a cause of action under 42 *U.S.C.* § 1983); *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 *U.S.* 388, 91 *S.Ct.* 1999, 29 *L.Ed.*2d 619 (1971) (A cause of action for damages arises under the fourth amendment itself when its provisions are violated by federal officials). Nevertheless, this Court need not, and should not, itself end the search for effective solutions. The debate over possible alternatives to the exclusionary rule has gone on for a long time, and has taken on an increased vigor since the Supreme Court's decision in *United States v. Leon, supra,* 468 *U.S.* 897, 104 *S.Ct.* 3405, 82 *L.Ed.*2d 677 Chief Justice Burger has suggested a comprehensive remedy in his dissent in *Bivens, supra,* 403 *U.S.* at 422–23, 91 *S.Ct.* at 2017–18, 29 *L.Ed.* at 642. This proposal is similar to those that have been suggested from time to time by legal commentators. *See, e.g.,* Gangi, *The Exclusionary Rule:* ***174** *A Case Study in Judicial Usurpation,* 34 Drake L.Rev. 33 (1984–85);[7] Berner, *Fourth-Amendment Enforcement Models: Analysis and Proposal,* 16 Val.U.L.Rev. 215 (1981); Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule,* 95 *F.R.D.* 211 (1982). I would leave to the sound judgment of the Legislature and the Executive whether there can be developed other ways to preserve the constitutional right of citizens to be secure against unreasonable searches and seizures. Of course, this Court reserves the power to pass upon the constitutionality of any action undertaken by the other branches of government. *See Hills Dev. Co. v. Bernards Tp. in Somerset Cty.,* 103 *N.J.* 1, 510 *A.*2d 621 (1986). In the meantime, I continue to believe strongly in the significance of the exclusionary rule in serving the constitutional right of ****866** citizens to be free from unreasonable searches and seizures and would not hesitate to recognize and apply the exclusionary rule to this end as a matter of state common law.

IV.

For the reasons stated, I concur in the judgment of the Court.

GARIBALDI, J., concurring in part and dissenting in part.

I concur with the majority's adoption of the *Illinois v. Gates,* 462 *U.S.* 213, 103 *S.Ct.* 2317, 76 *L.Ed.*2d 527, *reh'g denied,* 463 *U.S.* 1237, 104 *S.Ct.* 33, 77 *L.Ed.*2d 1453 (1983), totality-of-the-circumstances test to determine the validity of a search warrant under Article I, paragraph 7 of the New Jersey Constitution. I dissent from the majority's failure to recognize, as a matter of state law, the "good faith" exception to the exclusionary rule ***175** set forth in *United States v. Leon,* 468 *U.S.* 897, 104 *S.Ct.* 3405, 82 *L.Ed.*2d 677 (1984).

I consider the dominant justification of the exclusionary rule to be the deterrence of police conduct that violates Article I, paragraph 7 of the New Jersey Constitution. The majority, however, transforms this judicially-created remedy into a state constitutional right. It fears that adoption of a good faith exception to the exclusionary rule will undermine the constitutionally-guaranteed standard of probable cause. This position strikes an improper balance between the valid goal of protecting individual rights under the state constitution and the public's right to have those who transgress the law brought to justice. "The criminal is to go free because the constable has blundered." *Eleuteri v. Richman,* 26 *N.J.* 506, 512, 141 *A.*2d 46 (1958), quoting *People v. Defore,* 242 *N.Y.* 13, 21,

150 *N.E.* 585, 587 (Ct.App.), *cert. den.,* 270 *U.S.* 657, 46 *S.Ct.* 353, 70 *L.Ed.* 784 (1926). A limited good faith exception more properly accommodates the legitimate interests of the public in an effective criminal justice system without sacrificing the individual rights protected by our Constitution. Adopting the good faith exception to the exclusionary rule reflects not a lesser concern with safeguarding an individual's constitutional rights but a deeper appreciation of the high costs incurred when probative, reliable evidence is barred because of investigative error.

Moreover, while it is undisputed that a state may provide greater protection to individual rights than is found in the United States Constitution, a departure from the federal constitution should be supported by sound historical or policy reasons. *State v. Hunt,* 91 *N.J.* 338, 345, 450 *A.*2d 952 (1982). Consistent state and federal rulings are crucial to the rational development of criminal law and the guidance of our law-enforcement officials. Only a strong state purpose would justify divergence in this very sensitive area. An examination of the New Jersey Constitution, statutes, and cases reveals no such purpose, and in fact leads to the conclusion that adoption of the *Leon* and *Sheppard* limited good faith exception is consistent with New Jersey law.

***176** I

Since *Mapp v. Ohio,* 367 *U.S.* 643, 81 *S.Ct.* 1684, 6 *L.Ed.*2d 1081 (1961), the Supreme Court, recognizing the high cost to the criminal justice system of indiscriminately suppressing all probative evidence, has applied a balancing approach that has gradually eroded the scope of the exclusionary rule. *See Stone v. Powell,* 428 *U.S.* 465, 96 *S.Ct.* 3037, 49 *L.Ed.*2d 1067 (1976); *United States v. Peltier,* 422 *U.S.* 531, 95 *S.Ct.* 2313, 45 *L.Ed.*2d 374 (1975); *United States v. Calandra,* 414 *U.S.* 338, 94 *S.Ct.* 613, 38 *L.Ed.*2d 561 (1974); *Alderman v. United States,* 394 *U.S.* 165, 89 *S.Ct.* 961, 22 *L.Ed.*2d 176, *reh'g denied,* 394 *U.S.* 939, 89 *S.Ct.* 1177, 22 *L.Ed.*2d 475 (1969). In those cases, the Court held that the exclusionary rule is a judicial remedy that must be sensitive to the costs and benefits of its imposition. In *United States v. Leon, supra,* 468 *U.S.* 897, 104 *S.Ct.* 3405, 82 *L.Ed.*2d 677, and its companion ****867** case, *Massachusetts v. Sheppard,* 468 *U.S.* 981, 104 *S.Ct.* 3424, 82 *L.Ed.*2d 737 (1984), the Court specifically adopted a good faith exception to the exclusionary rule.

In *United States v. Leon, supra,* 468 *U.S.* at 922, 104 *S.Ct.* at 3421, 86 *L.Ed.*2d at 698, the Court concluded that the "marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs [to the criminal justice system] of exclusion." To understand fully the impact of the exclusionary rule in search and seizure cases one must recognize that unlike other exclusionary rules involving the fifth and sixth amendments—which often implicate concerns about the inherent reliability and truthworthiness of the excluded evidence—this rule excludes evidence that is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. As Justice Black emphasized in his dissent in *Kaufman v. United States,* 394 *U.S.* 217, 237, 89 *S.Ct.* 1068, 1079, 22 *L.Ed.*2d 227, 243 (1969):

> ***177** A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.

In *Leon,* the Court acknowledged some of the substantial social costs of applying the exclusionary rule: the rule impedes the truth-finding functions of the jury and judges; allows some guilty defendants to go free or receive reduced sentences due to plea bargains; and, through its indiscriminate application, may generate disrespect for the administration of justice.[1] 468 *U.S.* at 906–09, 104 *S.Ct.* at 3412–14, 82 *L.Ed.*2d at 688–89. The Court stated:

> Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. [*Id.*]
>
> The good faith exception seeks to rectify this disparity between the error committed by the police officer and the windfall afforded a guilty defendant.

***178** Recognizing the extreme importance of protecting an individual's right to be free from unreasonable seizures, the Court in *Leon* did not abolish, but merely modified, the exclusionary rule to provide that

> [s]uppression ... remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false

> or would have known was false except for his reckless disregard of the truth.... The exception ... will also not apply in cases where the issuing ****868** magistrate wholly abandoned his judicial role ...; in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." ... Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. [citations omitted.] [468 *U.S.* at 923–24, 104 *S.Ct.* at 3421–22, 82 *L.Ed.*2d at 698–99.]

The Court concluded that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis. In each instance, the court must weigh the costs and benefits of applying the rule. In short, probative evidence should not be suppressed where its exclusion will serve no useful, recognized purpose.

The foundation of the majority's decision is its assumption that *Leon's* limited good faith exception will tend to undermine the motivation of law-enforcement officers to comply with the constitutional requirement of probable cause. The majority fails to recognize that indiscriminate application of the exclusionary rule may actually hinder the educative and deterrent functions of the suppression remedy. *See* Kaplan, "The Limits of the Exclusionary Rule," 26 *Stan.L.Rev.* 1027, 1050 (1974) ("Instead of disciplining their employees, police departments generally have adopted the attitude that the courts cannot be satisfied, that the rules are hopelessly complicated and subject to change, and that the suppression of evidence is the courts' problem and not the departments'.").

The good-faith exception fashioned in *Leon* does not reduce a police officer's incentive to respect the Constitution, because it ***179** is triggered only when an officer's conduct is objectively reasonable.

> If evidence is suppressed only when a law enforcement officer should have known that he was violating the Fourth Amendment, police departments may look more seriously at the officer's misconduct when suppression is invoked. Moreover, by providing that evidence gathered in good-faith reliance on a reasonable rule will not be excluded, a good-faith exception creates an incentive for police departments to formulate rules governing activities of officers in the search-and-seizure area. Many commentators, including proponents of the exclusionary sanction, recognize that the formulation of such rules by police departments, and the training necessary to implement these guidelines in practice, are perhaps the most effective means of protecting Fourth Amendment rights. *See* K. Davis, Discretionary Justice (1969); McGowan, "Rule-Making and the Police," 70 *Mich.L.Rev.* 659 (1972); Amsterdam, "Perspectives on the Fourth Amendment," 50 *Minn.L.Rev.* 349, 416–431 (1974).
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> [*Illinois v. Gates, supra,* 462 *U.S.* at 260–61 n. 15, 103 *S.Ct.* at 2344–45 n. 15, 76 *L.Ed.*2d at 563 n. 15 (White, J., concurring).]

If a police officer acting in an objectively reasonable manner secures a warrant from a judge and in good faith believes he has complied with constitutional requirements, what more can we expect of him? Law-enforcement officers must constantly make judgments about whether there is probable cause to make an arrest.

> Is there reasonable ground to believe that a crime has been committed and that a particular suspect has committed it? Sometimes the historical facts are disputed or are otherwise in doubt. In other situations the facts may be clear so far as they are known, yet the question of probable cause remains. In still others there are special worries about the reliability of secondhand information such as that coming from informants. ****869** In any of these situations, which occur repeatedly, when the officer is convinced that he has probable cause to arrest he will very likely make the arrest. [*Stone v. Powell, supra,* 428 *U.S.* at 538–39, 96 *S.Ct.* at 3073, 49 *L.Ed.*2d at 1113 (White, J., dissenting).]

In most of these decisions, the police officer determines that there is sufficient probable cause to make an arrest. This is the case particularly when a warrant is issued and reviewed by an officer's superiors, as now required in New Jersey, and by a judge. Nevertheless, one need consider only the many difficulties the courts themselves have had in defining standards for what constitutes "probable cause" and the scope of the exclusionary rule to realize that there will be occasions when the police officer, his superiors, and the judge will guess wrong.

> ***180** [T]here will be those occasions where the trial or appellate court will disagree [with the police officer] on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though

> reasonable men could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution.
>
> ___
>
> It is true that in such cases the courts have ultimately determined that in their view the officer was mistaken; but it is also true that in making constitutional judgments under the general language used in some parts of our Constitution, including the Fourth Amendment, there is much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest.
>
> [*Stone v. Powell, supra,* 428 *U.S.* at 539–40, 96 *S.Ct.* at 3073, 49 *L.Ed.*2d at 1114 (White, J., dissenting).]

In such circumstances police officers have acted as reasonable officers would and should act, and as the public expects them to act. When it turns out that they have acted mistakenly, but in good faith and on reasonable grounds, the exclusion of such evidence cannot act as a deterrent. "The officers, if they do their duty, will act in similar fashion in similar circumstances in the future...." *Id.* at 540, 96 *S.Ct.* at 3073, 49 *L.Ed.*2d at 1114. In such cases, application of the exclusionary rule will result only in keeping relevant and probative evidence from the jury, thereby substantially impairing or aborting the trial.

I do not share the fears of the opponents of the good faith exception that law-enforcement officers will lack necessary motivation to secure sufficient information to issue warrants for probable cause and that judges, in reviewing such warrants, will act as mere rubber stamps. A warrant from a judge is a safeguard designed to protect individual rights and insure that a reasonable basis for a search exists. *See State v. Kasabucki,* 52 *N.J.* 110, 115, 244 *A.*2d 101 (1968). It makes no sense to suggest that a police officer would deliberately appear before a judge with an ***181** inadequate affidavit, knowing that the warrant, even if granted in the first instance, might fail to withstand a later challenge before a second judge. Succinctly stated, the warrant requirement is based on the assumption that the judge will act properly and in so doing will cause law-enforcement authorities to act properly.[2]

****870** I do not presume that either the law-enforcement officers or the judges of the State of New Jersey will abdicate their responsibility to apply the law. The "Policy Statement of the Attorney General of New Jersey and County Prosecutors Association of New Jersey Regarding Prosecutorial Review of Search Warrant Applications," issued in February 1985, should dispel such concerns. The Policy Statement was issued after the *Gates* and *Leon* decisions, refuting any suggestion that these cases will reduce scrutiny of search warrants by law enforcement personnel.

I think that the majority's fears of the good faith exception in this regard are unfounded. Nonetheless,

> [i]f it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. [*United States v. Leon, supra,* 468 *U.S.* at 928, 104 *S.Ct.* at 3424, 82 *L.Ed.*2d at 702 (Blackmun, J., concurring).]

No such change in police behavior has yet occurred. Until it does, I believe it is better to allow the admission of evidence seized by an officer acting with an objectively reasonable good ***182** faith belief that his conduct satisfied constitutional requirements. In such a case, the deterrent effect of the exclusionary rule is "so minimal, if not nonexistent, that the balance clearly favors the rule's modification." *Illinois v. Gates, supra,* 462 *U.S.* at 261, 103 *S.Ct.* at 2344, 76 *L.Ed.* at 563 (White, J., concurring).

II

There are no independent state constitutional grounds to justify our divergence from federal law in this area. In fact, the "divergence criteria" developed in *State v. Hunt, supra,* 91 *N.J.* at 364–68, 450 *A.*2d 952 (Handler, J., concurring), and adopted in *State v. Williams,* 93 *N.J.* 39, 459 *A.*2d 641 (1983), offer compelling reasons why the good faith exception is consistent with New Jersey precedents, practice, and traditions. Furthermore, the underlying reasons expressed by the Court in *Leon* for adopting the good faith exception have long been part of New Jersey law.

Initially, New Jersey courts were outspoken in their disregard for the exclusionary rule. From the rule's inception, we have recognized that its dominant purpose is to deter over-zealous

law-enforcement officers from making unreasonable searches and seizures.[3] Nevertheless, the courts early recognized that the practical effect of the federal rule "is not to punish the individual who has violated the constitutional provision by making an unreasonable search and seizure, but to shield the criminal and penalize the people of this state by suppressing evidence tending to prove an offense 'against its peace and dignity.' " *State v. Black,* 5 *N.J.Misc.* 48, 50, 135 *A.* 685 (Quarter Sessions 1926). In *Black,* the court drew heavily from ***183** Professor Wigmore's scathing criticism of the rule, which labeled the exclusionary remedy "indirect and unnatural." According to Wigmore, "Our [federal courts'] way of upholding the constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." 4 J. Wigmore,*Evidence* (2d ed.) § 2183, 2184, 2259(b), 2264, *quoted in Black, supra,* ****871** 5 *N.J.Misc.* at 51, 135 *A.* 685. Since "[t]he administration of the law in New Jersey has always been practical and never over-sensitive to shield an accused," *id.* at 52, 135 *A.* 685, the court in *Black* refused to adopt the "new exception" to the general rule of admissibility.

The rule of admissibility was thus firmly in place when the delegates to New Jersey's Constitutional Convention assembled in the summer of 1947. An amendment proposed at the Convention would have added the following sentence to Article I, paragraph 7:

> Nothing obtained in violation hereof shall be received into evidence.

The delegates debated the merits of the exclusionary rule based on the federal experience, and defeated the proposed amendment by a final vote of 45 to 26. *See* 1 *Convention Proceedings Record* 598–608 (August 19, 1947). While the legislative history of the fourth amendment[4] is silent with respect to the exclusionary rule, the rule was specifically rejected by the Framers of the New Jersey Constitution. This is compelling evidence that the rule is not a part of our constitution but at most a judicial remedy.

Even after *Wolf v. Colorado,* 338 *U.S.* 25, 69 *S.Ct.* 1359, 93 *L.Ed.* 1782 (1949), the Court rejected the exclusionary rule and continued to rely on the general rule of admissibility. In *Eleuteri v. Richman, supra,* 26 *N.J.* at 513, 141 *A.*2d 46, Chief Justice Weintraub, writing for a unanimous Court, emphasized that the dominant purpose of the rule is to deter unreasonable searches ***184** and seizures. We expressed the same concerns as those expressed by the Supreme Court in *Leon* about the high cost of the exclusionary rule:

> The issue arises only when the evidence is incriminating and thus, in its immediate impact, the rule of exclusion benefits only the guilty. Unlike the extorted confession, to which an analogy is frequently drawn, the evidence illegally seized is not the fruit of official wrong; it is the criminal's own work product which could have been seized lawfully and used against him. If such evidence and "the fruit of the poisonous tree" are suppressed, "The criminal is to go free because the constable has blundered." *People v. Defore,* 242 *N.Y.* 13, 150 *N.E.* 585, 587 (Ct.App.1926), *certiorari denied,* 270 *U.S.* 657, 46 *S.Ct.* 353, 70 *L.Ed.* 784 (1926). Two wrongs go unpunished at the expense of society. 8 *Wigmore, supra,* § 2184, p. 40. Unlike the Federal Government for which the exclusionary rule was conceived, the states must contend with many more crimes of violence. The stakes are different.
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> [26 *N.J.* at 512, 141 *A.*2d 46.]

We have long recognized that the exclusionary rule should be applied only in the presence of culpable police misconduct. *See Eleuteri v. Richman, supra,* 26 *N.J.* at 514, 141 *A.*2d 46 ("It is one thing to condemn the product of an arrogant defiance of the Constitution; it is another to impose the sanction when the official intends to respect his oath of office but is found to be mistaken, let us say, by the margin of a single vote."); *State v. Gerardo,* 53 *N.J.* 261, 267, 250 *A.*2d 130 (1969) (holding that exclusion was not mandated by the fourth amendment since, "important as it is in our society, [it] does not call for imposition of judicial sanctions where enforcing officers have followed the law with such punctilious regard as they have here"); *State v. Zito,* 54 *N.J.* 206, 211, 213, 254 *A.*2d 769 (1969) (concluding that an officers' reliance on a statute providing that a person's inability to "give a good account of himself" is prima facie evidence of illegal purpose was not "unreasonable" within the meaning of the fourth amendment. "Surely," the court noted, "it is not arrogant of an officer to abide by the statutes of his State. On the contrary, it would be presumptuous of him to sit in constitutional judgment." In the circumstances the court found that ****872** suppression of the fruits "would be a windfall to the criminal, and serve no laudable end...."); *State v. Bisaccia,* 58 *N.J.* 586, 589, 591, 279 *A.*2d 675 (1971) (a deliberately false judgment of acquittal ***185** "debases the judicial process" and breeds contempt for the deterrent thrust of the criminal law. "To justify so serious an insult to the judicial process, some compensating gain should be incontestable." Moreover, we remained skeptical as to whether the rule has any genuine deterrent effect at all, but

especially where, as in that case, the police had acted in good faith and "without a trace of insolence.").

In *State v. Bruzzese,* 94 *N.J.* 210, 463 *A.*2d 320 (1983), we recently reaffirmed that the touchstone of the fourth amendment is reasonableness. We held that a police officer's search and seizure would be considered reasonable only if it conformed to objectively reasonable police standards. This is the same test established by the Court in *Leon.* Likewise, in *Bruzzese* we emphasized that the application of an objective standard is necessary to safeguard the privacy rights of our citizens, since the "requirement of reasonableness is not one without teeth." *Id.* at 226, 463 *A.*2d 320; *see also State v. Guerra,* 93 *N.J.* 146, 152, 459 *A.*2d 1159 (1983) ("[I]f the validity of a search can be sustained independently on *objective grounds demonstrating reasonableness,* the existence of other defects that do not derogate from the *overall objective reasonableness of the search* or impugn the integrity of the judicial process should not be relied upon to invalidate the search.") (emphasis added).

Moreover, we have recognized, as did the Court in *Leon,* that the reasonableness of a police officer's conduct is to be evaluated in a practical and realistic manner. We have long acknowledged the difficult problems law-enforcement officials face concerning probable cause and realized that

> [t]he officer's statements must be looked at in a common sense way without a grudging or negative attitude. There must be an awareness that few policemen have legal training and that the material submitted to demonstrate probable cause may not be described with the technical nicety one would expect of a member of the bar. Moreover, the judge should take into account the specialized experience and work-a-day knowledge of policemen. *State v. Contursi,* 44 *N.J.* 422, 431 [209 *A.*2d 829] (1965). The facts asserted must be tested by the practical considerations of everyday life on which reasonably prudent and experienced police officers act.
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> [*State v. Kasabucki, supra,* 52 *N.J.* at 117, 244 *A.*2d 101.]

***186** We encourage police officers to seek warrants, since the review of a warrant by a neutral and detached judge offers a further safeguard to the public against unreasonable police action. As Justice Francis eloquently wrote in *State v. Kasabucki, supra,* 52 *N.J.* at 115–16, 244 *A.*2d 101:

> When the police officer does not rely on his own evaluation of facts, but submits them to the independent judgment of a judicial officer for a determination as to whether they add up to probable cause, a search pursuant to a warrant issued by a judge cannot be equated with "insolence in office" or abuse of the officer's police power, nor can it be said reasonably that the citizen's Fourth Amendment security rests only in the discretion of the police. Thus when the adequacy of the facts offered to show probable cause is challenged after a search made pursuant to a warrant, and their adequacy appears to be marginal, the doubt should ordinarily be resolved by sustaining the search. That is because the warrant provides clear evidence of the legitimacy of the officer's purpose. The decisions bespeak the preference accorded a search authorized after the facts and inferences therefrom have been subjected to neutral judicial consideration and found to constitute probable cause for it. [Citations omitted.]

The foregoing review of New Jersey case law demonstrates that New Jersey has no ****873** historical attachment to the exclusionary rule. In fact, the cases show that we have, in essence, long recognized a good faith exception to the exclusionary rule. Thus, I disagree with the majority that the exclusionary rule has been embedded in our jurisprudence for the last twenty-five years. *Ante* at 852.[5]

I do not think that the public or law-enforcement personnel will perceive that the Court is reducing its vigilance in protecting the state constitutional rights of an individual if a prosecutor ***187** is allowed to introduce evidence obtained by an officer acting in reasonable reliance on a search warrant issued by a neutral and detached judge, but ultimately found to be unsupported by probable cause. Indeed, unless the officer and the judge act in a reasonably objective matter, the evidence will be suppressed. In a sense, the good faith exception is a contest not between the state and the individual, but between two individuals—one seeking protection against a police officer's overzealous conduct in conducting an unreasonable search and the other seeking a police officer's protection from criminal attack. I perceive that the public will view the good faith exception to the exclusionary rule as a sensible accommodation between protecting an individual's constitutional rights and punishing the guilty.

III

We turn now to an application of the good faith exception to this case. Whether the policeman's conduct here was that of an objectively reasonable policeman is a very close

question. He was a new officer, drafting his first warrant, which was not reviewed by any of his superiors. He and another detective conducted an independent investigation for three hours. Certainly, under the present Policy Statement of the Attorney General and County Prosecutors Association of New Jersey, there would have to be an internal screening of the warrant by either the Attorney General's or the County Prosecutor's Staff. Moreover, considering the scope of the independent investigation done by the officers in *Leon,* there is serious question whether there was sufficient independent investigation in this case. Nevertheless, the courts below, as well as the majority, believe that the officer acted in good faith and in an objectively reasonable manner. I would abide by their decision and therefore reverse the judgment of the Appellate Division and permit introduction of the evidence under the good faith exception to the exclusionary rule. In the future, however, in the absence of a significant independent investigation and pre-application ***188** screening, I would not hold similar conduct by a police officer to be objectively reasonable.

For affirmance—Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN and STEIN—6.

Concurring in part and dissenting in part—Justice GARIBALDI—1.

All Citations

105 N.J. 95, 519 A.2d 820, 55 USLW 2402

Footnotes

1 For a discussion of several theories that have been proffered concerning the purpose of the exclusionary rule see Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases," 83 *Colum.L.Rev.* 1365, 1380–85 (1983), and Kamisar, "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an 'Empirical Proposition'?," 16 *Creighton L.Rev.* 565 (1983).

2 *See* Mertens & Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 *Geo.L.J.* 365, 365–66 & nn. 4–6 (1981).

3 *See, e.g.,* Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?," 62 *Judicature* 215 (1978).

4 The fourth amendment to the United States Constitution provides:

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

Article I, paragraph 7 of the New Jersey Constitution provides:

> 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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

5 *See* Kamisar, "*Gates,* 'Probable Cause,' 'Good Faith,' and Beyond," 69 *Iowa L.Rev.* 551 (1984); Mascolo, "Probable Cause Revisited: Some Disturbing Implications Emanating from *Illinois v. Gates,*" 6 *W. New Eng.L.Rev.* 331 (1983); LaFave, "Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)," 74 *J. of Crim.L. & Criminology* 1171 (1983); Livermore, "The *Draper-Spinelli* Problem," 21 *Ariz.L.Rev.* 945 (1979); Rebell, "The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards," 81 *Yale L.J.* 703 (1971); Note, "Probable Cause and the First-Time Informer," 43 *U. of Colo. L.Rev.* 357 (1972); Mather, "The Informer's Tip as Probable Cause for Search or Arrest," 54 *Cornell L.Rev.* 958 (1969); Comment, "Informer's Word as the Basis for Probable Cause in the Federal Courts," 53 *Calif.L.Rev.* 840 (1965).

6 The question whether independent police investigation can also remedy a deficiency in the informant's "basis of knowledge" has been the subject of sharp academic debate. Maryland Appellate Judge Charles Moylan, an

acknowledged fourth-amendment authority, concludes that police investigation is irrelevant to the informant's basis of knowledge:

> The "basis of knowledge" prong assumes an informant's "veracity," and then proceeds to probe and test his conclusion: ("What are the raw facts upon which the informant based *his* conclusion?" "How did the informant obtain those facts?" "What precisely did he see or hear or smell or touch firsthand?" "If he heard the facts from someone else, what makes that third person 'credible' and how did that third person come by the knowledge?"). The judge must ascertain the source for the raw data—the product of someone's senses—and then weigh that data for himself. He is concerned not with that part of an affidavit or testimony which provides information *about* the informant but with the recitation of the story coming *from* the informant.
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> —
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> [T]he "independent verification" technique cannot repair a defect in the "basis of knowledge" prong. Verifying the truth of part of a story does nothing either to ascertain the story's source or to check the informant's perhaps invalid conclusions. [*Stanley v. State,* 19 *Md.App.* 507, 531, 313 *A.*2d 847, 861–62 (1974).]

See 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment,* § 3.3(f) at 562 (1978); *Illinois v. Gates, supra,* 462 *U.S.* at 281–82, 103 *S.Ct.* at 2355, 76 *L.Ed.*2d at 576–77 (Brennan, J., dissenting). *But cf. id.* at 270 n. 22, 103 *S.Ct.* at 2349–50 n. 22, 76 *L.Ed.*2d at 569 n. 22 (White, J., concurring) (if police corroborate "information from which it can be inferred that the informant's tip was grounded on inside information, this corroboration is sufficient to satisfy the basis of knowledge prong" as well as the veracity prong); Kamisar, *supra* note 5, at 558 ("I share Justice White's view that independent police corroboration can 'cure' a deficiency in either or both prongs.").

7 Justice Stevens, dissenting, believed that the warrant was defective even under the newly-adopted totality-of-the-circumstances test. *Id.* at 291–94, 103 *S.Ct.* at 2360–62, 76 *L.Ed.*2d at 582–85. Justices Brennan and Marshall dissented on the basis that repudiation of the *Aguilar-Spinelli* rules was unwise and unnecessary. 462 *U.S.* at 286–91, 103 *S.Ct.* at 2357–60, 76 *L.Ed.*2d at 579–82. Justice White, concurring, believed that the warrant was valid under the *Aguilar-Spinelli* standard, which he thought should be clarified but not abandoned. *Id.* at 267–73, 103 *S.Ct.* at 2347–51, 76 *L.Ed.*2d at 567–71.

8 This aspect of *Gates* was reaffirmed by the Court in *Massachusetts v. Upton,* 466 *U.S.* 727, 104 *S.Ct.* 2085, 80 *L.Ed.*2d 721 (1984). The standard of review established in *Gates* and endorsed in *Upton* appears to contradict the Court's formulation in *Ker v. California,* 374 *U.S.* 23, 83 *S.Ct.* 1623, 10 *L.Ed.*2d 726 (1963). Justice Clark, writing for the majority in *Ker,* approved *de novo* review when it is necessary to vindicate constitutionally-mandated standards:

> [T]he reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—i.e., constitutional—criteria established by this Court have been respected. [*Id.* at 33–34, 83 *S.Ct.* at 1629–30, 10 *L.Ed.*2d at 738 (citations omitted).]

9 The detective's affidavit is set forth verbatim in the opinion of the Appellate Division, 113 *N.J.Super.* 152, 154–55, 273 *A.*2d 361 (1971).

10 The Attorney General cites the *Ebron* analysis for its similarity to the totality-of-the-circumstances test adopted in *Illinois v. Gates, supra.* To the extent that *Ebron* acknowledges that an informant's tip that neither discloses the basis of the informant's knowledge nor contains self-verifying detail can be supplemented by collateral facts to sustain a warrant, the holding in *Ebron* indeed resembles the analysis relied on by the Supreme Court's majority in *Gates.* We also acknowledged in *Ebron* that the propriety of supplementing an informant's tip that fails one or both prongs of *Aguilar* with

corroborating details in an officer's affidavit was specifically recognized by the Court's opinion in *Spinelli v. United States, supra,* 393 *U.S.* at 418, 89 *S.Ct.* at 590, 21 *L.Ed.*2d at 645.

11 The "totality-of-the-circumstances" test that we endorse and apply in this case is a principle of state constitutional law used to test determinations of probable cause pursuant to article I, paragraph 7 of the New Jersey Constitution. We assume that the application of this standard will be substantially consistent with the criteria set forth in *Illinois v. Gates, supra,* 462 *U.S.* at 238, 103 *S.Ct.* at 2332, 76 *L.Ed.*2d at 548.

12 The affidavit at issue in this case is substantially less specific as to time than the affidavit construed in *State v. Blaurock,* 143 *N.J.Super.* 476, 363 *A.*2d 909 (App.Div.1976). In that case the Appellate Division refused to suppress evidence where the affidavit was challenged on "staleness" grounds. Relying on *United States v. Harris,* 482 *F.*2d 1115, 1119 (3d Cir.1973), and *United States v. Johnson,* 461 *F.*2d 285, 287 (10th Cir.1972), the court concluded that the question of the staleness of probable cause depends not merely on the recitation in the affidavit of particular dates and times, but upon a careful assessment of the nature of the allegedly unlawful activity. In reaching its conclusion, the court considered the fact that 18 days had passed between the last reported surveillance and the date of the affidavit to be inconsequential because the affidavit included a detailed description of the defendant's drug-related activities. *Cf. Sgro v. United States,* 287 *U.S.* 206, 210–11, 53 *S.Ct.* 138, 140, 77 *L.Ed.* 260, 263 (1932) ("[I]t is manifest that the proof [of probable cause] must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case.").

13 A lucid explanation of the role of police observations in supplementing an informant's allegations to establish probable cause is found in *Stanley v. State, supra,* 19 *Md.App.* at 528, 313 *A.*2d at 860:

> Such observations serve two purposes. They have a primary function, of course, bearing directly on the establishment of probable cause. When such observations are sufficient in themselves to demonstrate probable cause, the final problem is thereby solved and all information both from and about the informant becomes a redundancy; probable cause is established without necessary resort to the hearsay. Similarly, direct observations, insufficient unto themselves to establish probable cause, may nevertheless be added to trustworthy hearsay, which meets *Aguilar's* standards but is also insufficient unto itself, so that the combination of incriminatory elements may establish the probable cause which neither alone quite demonstrates.

14 "Policy Statement of the Attorney General of New Jersey and the County Prosecutors Association of New Jersey Regarding Prosecutorial Review of Search Warrant Applications," *New Jersey Prosecutors Manual,* at 46–1 to 46–4 (February 1985). See discussion *infra* at 852–853.

15 In a companion case, *Massachusetts v. Sheppard,* 468 *U.S.* 981, 104 *S.Ct.* 3424, 82 *L.Ed.*2d 737 (1984), the Court applied the good-faith exception to the exclusionary rule to overturn the suppression of evidence obtained pursuant to a search warrant that was "technically" defective because the issuing magistrate had made a clerical error in failing adequately to alter the form of the warrant. Justice Stevens, concurring in the judgment, maintained that the good-faith exception was not necessary to decide the case because it was clear that the warrant issued on probable cause and that the objects seized during the search were consistent with the limitations contained in the affidavit submitted in support of the warrant. *Id.* at 991, 104 *S.Ct.* at 3430, 82 *L.Ed.*2d at 745 (citing *United States v. Leon, supra,* 468 *U.S.* at 963–66, 104 *S.Ct.* at 3448–50, 82 *L.Ed.*2d at 725–27). Although the issue posed by *Sheppard* is not involved in this case, our Court Rules deal specifically with "technically defective" search warrants. *See R.* 3:5–7(g): "In the absence of bad faith, no search or seizure made with a search warrant shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution."

16 *United States v. Cassity,* 468 *U.S.* 1212, 104 *S.Ct.* 3581, 82 *L.Ed.*2d 879 (1984); *United States v. Tate,* 468 *U.S.* 1206, 104 *S.Ct.* 3575, 82 *L.Ed.*2d 873 (1984); *United States v. Crozier,* 468 *U.S.* 1206, 104 *S.Ct.* 3575, 82 *L.Ed.*2d 873 (1984).

17 Recognizing that "[m]any objections to a good-faith exception assume that the exception will turn on the subjective good-faith of individual officers," the Court emphasized that the standard of reasonableness adopted in *Leon* was an objective one. 468 *U.S.* at 919 n. 20, 104 *S.Ct.* at 3420 n. 20, 82 *L.Ed.*2d at 696 n. 20. The Court added, "The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits." *Id.*

18 *But see United States v. Leon, supra,* 468 *U.S.* at 958–59, 104 *S.Ct.* at 3445–46, 82 *L.Ed.*2d at 721–22 (Brennan, J., dissenting) ("Given such a relaxed standard, it is virtually inconceivable that a reviewing court, when faced with a defendant's motion to suppress, could first find that a warrant was invalid under the new *Gates* standard, but then, at the same time, find that a police officer's reliance on such an invalid warrant was nevertheless "objectively reasonable" under the [*Leon*] test. Because the two standards overlap so completely, it is unlikely that a warrant could be found invalid under *Gates* and yet the police reliance upon it could be seen as objectively reasonable; otherwise, we would have to entertain the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant." (citing Kamisar, *supra* note 5, at 588–89; Wasserstrom, "The Incredible Shrinking Fourth Amendment," 21 *Am.Crim.L.Rev.* 257 (1984); LaFave, "The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,' " 43 *U.Pitt.L.Rev.* 307, 333–59 (1982)).

19 For an excellent discussion of the history and development of the exclusionary rule see Stewart, *supra* note 1, at 1372–92, and Mertens and Wasserstrom, *supra* note 2, at 373–89.

20 *Boyd* concerned a civil forfeiture proceeding in which the government, by subpoena, sought the production of invoices for goods in order to prove their quantity and value. The defendants complied with the subpoena but appealed the judgment on the ground that the compelled production violated their fourth and fifth-amendment rights. In an impassioned opinion, Justice Bradley emphasized that opposition to unreasonable searches was a primary cause of the effort to achieve independence from England:

> In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer." This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." [116 *U.S.* at 624–25, 6 *S.Ct.* at 528–29, 29 *L.Ed.* at 749 (footnote omitted).]

Justice Bradley referred to Lord Camden's famous opinion in *Entick v. Carrington, State Trials,* XIX, 1029 (1765), as the source of the principles embodied in the fourth amendment:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasions of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of *Lord* Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. [116 *U.S.* at 630, 6 *S.Ct.* at 535, 29 *L.Ed.* at 751.]

21 In its opinion in *Weeks,* the Court distinguished the *Adams* case on the ground that Weeks had applied for the return of his papers before trial. 232 *U.S.* at 396, 34 *S.Ct.* at 345–46, 58 *L.Ed.* at 657.

22 *Wolf* marked the first occasion that the Court advanced the rationale of deterrence as a basis for the exclusionary rule. 338 *U.S.* at 31, 69 *S.Ct.* at 1362–63, 93 *L.Ed.* at 1787.

23 In an appendix to the opinion, the Court included New Jersey among the states that had declined to follow *Weeks.* 338 *U.S.* at 33–39, 69 *S.Ct.* at 1364–67, 93 *L.Ed.* at 1788–91 (citing *State v. Black,* 5 *N.J.Misc.* 48, 135 *A.* 685 (Cty.Ct.1926)).

24 In *Rochin,* the police officers used a stomach pump to recover two capsules of morphine that the defendant had swallowed.

25 Although the Court in *Mapp* expressly rejected the reasoning in *Wolf* that the states were free to rely on "equally effective" methods other than the exclusionary rule to enforce the fourth amendment, members of the Court periodically endorse the possibility of alternative means to vindicate the constitutional guarantee. *See* Burger, C.J., dissenting in *Bivens v. Six Unknown Narcotics Agents, supra,* 403 *U.S.* at 421–24, 91 *S.Ct.* at 2017–19. 29 *L.Ed.*2d at 641–43. This term in *Malley v. Briggs,* —— *U.S.* ——, 106 *S.Ct.* 1091, 89 *L.Ed.*2d 271 (1986), the Court upheld a § 1983 civil-damage judgment against a state police officer who had obtained arrest warrants against plaintiffs without probable cause. For a discussion of this issue see Stewart, *supra* note 1, at 1385–89.

26 In his dissent in *Leon,* Justice Stevens noted that *Illinois v. Gates* was decided after the Ninth Circuit held that the *Leon* warrant lacked probable cause and that it was "probable, though admittedly not certain, that the Court of Appeals would now conclude that the warrant in *Leon* satisfied the Fourth Amendment if it were given the opportunity to reconsider the issue in the light of *Gates.*" 468 *U.S.* at 961, 104 *S.Ct.* at 3447, 82 *L.Ed.*2d at 724. *See* Wasserstrom & Mertens, "The Exclusionary Rule on the Scaffold; But Was it a Fair Trial?," 22 *Amer.Crim.L.Rev.* 85, 98 (1984).

27 For a general discussion of the genesis of the fourth amendment see J. Landynski, *Search and Seizure and the Supreme Court,* 19–48 (1966), and N. Lasson, "The History and Development of the Fourth Amendment to the United States Constitution," *55 Johns Hopkins University Studies in Historical and Political Science No. 2,* 13–78 (1937).

28 One of the reasons for convening the Constitutional Convention in 1844 was the lack of a comprehensive bill of rights in the 1776 Constitution. The absence of a bill of rights has been attributed to the fact that New Jersey's was one of the earliest State Constitutions and was written in some haste:

> New Jersey was the third colony to adopt a constitution. The document was necessarily drawn in haste and practically without the benefit of earlier state constitutions to serve as models. It is assumed that this brief constitution was largely the work of one man; although there is dispute as to which member of the drafting committee of ten he was. In any event, the constitution became the law of the "colony" by vote of the provincial congress only eight days after the appointment of the committee. This haste may have been due partly to the arrival of the British fleet off Sandy Hook. [Proceedings of the New Jersey State Constitutional Convention of 1844, pp. x and xiii (footnote omitted).]

29 The opinion in *Valentin* notes that the prosecutor's failure to offer evidence as to the circumstances of the search was in reliance "on the long established rule in New Jersey" that evidence was admissible irrespective of the legality of the search. 36 *N.J.* at 43, 174 *A.*2d 737.

30 Justice Garibaldi's dissenting opinion cites a number of post-*Mapp* cases, *post* at 184–85, for the proposition that "New Jersey has no historical attachment to the exclusionary rule" and that "we have, in essence, long recognized a good-faith exception to the exclusionary rule." *Post* at 873. Each of these cases was decided on the basis of factors collateral to the exclusionary rule. In *State v. Gerardo,* 53 *N.J.* 261, 250 *A.*2d 130 (1969), the evidence in issue was obtained by federal authorities pursuant to duly issued search warrants but the federal prosecutions were dismissed on the basis that the fifth-amendment privilege against self-incrimination precluded prosecution under the federal wagering statute for failure to register before engaging in the business of gambling. Defendants sought suppression of the evidence in a state prosecution for violating the lottery laws. The issue was whether the dismissal of the federal indictment, in anticipation of which the search warrant had issued, barred the use of the evidence in the state prosecution. The Court affirmed the denial of the suppression motion. *State v. Zito,* 54 *N.J.* 206, 254 *A.*2d 769 (1969), concerned the validity of a warrantless search pursuant to an arrest in reliance on a statute challenged as unconstitutional. The Court held the statute to be valid and also concluded that the police had grounds independent of the statute for arresting the defendant. The applicability of the exclusionary rule was not an issue. *State v. Bisaccia,* 58 *N.J.* 586, 279 *A.*2d 675 (1971), involved a search pursuant to a warrant where both the warrant and affidavit incorrectly stated the address of the place to be searched as 371 rather than 375 10th Street. However, the affidavit in support of the warrant contained a detailed description of the sign on the front of the building. The issue did not concern our recognition of the exclusionary rule but rather the propriety of the officer's reliance on his affidavit in executing the warrant. *State v. Bruzzese,* 94 *N.J.* 210, 463 *A.*2d 320 (1983), *cert.*

denied, 465 *U.S.* 1030, 104 *S.Ct.* 1295, 79 *L.Ed.*2d 695 (1984), concerned the objective reasonableness of a warrantless search and did not involve New Jersey's recognition of the exclusionary rule.

31 *Supra* note 14.

32 Letter dated July 10, 1986, from Donald R. Belsole, First Assistant Attorney General, to Stephen W. Townsend, Clerk, New Jersey Supreme Court.

33 In his dissenting opinion in *Leon,* Justice Brennan emphasized that statistical studies on a national basis also suggest that the "costs" of the exclusionary rule are minimal:

> [I]ndeed, as the Court acknowledges, recent studies have demonstrated that the "costs" of the exclusionary rule—calculated in terms of dropped prosecutions and lost convictions—are quite low. Contrary to the claims of the rule's critics that exclusion leads to "the release of countless guilty criminals," Bivens v Six Unknown Federal Narcotics Officers, 403 US 388, 416, 29 L Ed 2d 619, 91 S Ct 1999 [2014] (Burger, C.J., dissenting), these studies have demonstrated that federal and state prosecutors very rarely drop cases because of potential search and seizure problems. For example, a 1979 study prepared at the request of Congress by the General Accounting Office reported that only 0.4% of all cases actually declined for prosecution by federal prosecutors were declined primarily because of illegal search problems. Report of the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 14 (1979). If the GAO data are restated as a percentage of *all* arrests, the study shows that only 0.2% of all felony arrests are declined for prosecution because of potential exclusionary rule problems. See Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 Am. Bar Found.Res.J. 611, 635. Of course, these data describe only the costs attributable to the exclusion of evidence in all cases; the costs due to the exclusion of evidence in the narrower category of cases where police have made objectively reasonable mistakes must necessarily be even smaller. The Court, however, ignores this distinction and mistakenly weighs the aggregated costs of exclusion in *all* cases, irrespective of the circumstances that led to exclusion against the potential benefits associated with only those cases in which evidence is excluded because police reasonably but mistakenly believe that their conduct does not violate the Fourth Amendment. When such faulty scales are used, it is little wonder that the balance tips in favor of restricting the application of the rule. [*United States v. Leon, supra,* 468 *U.S.* at 950–51, 104 *S.Ct.* at 3441–42, 82 *L.Ed.*2d at 716–17 (Brennan, J., dissenting).]

34 Counsel have been furnished a copy of this report and were afforded an opportunity to comment on its findings.

35 *See* Dripps, "Living with *Leon,*" 95 *Yale L.J.* 906 n.5 (1986).

36 Other commentators have expressed similar concerns. *See* Wasserstrom & Mertens, *supra* note 26, at 109–10, 114–15; Kamisar, *supra* note 1, at 662–63.

37 It should be noted that Justice White assumes that the application of the exclusionary rule in deportation proceedings would nevertheless be accompanied by a good-faith exception.

38 *Compare McFarland v. State,* 284 *Ark.* 533, ——, 684 *S.W.*2d 233, 243 (1985) (adopting modification to exclusionary rule as set forth in *Leon*); *McCary v. Commonwealth,* 228 *Va.* 219, 231–33, 321 *S.E.*2d 637, 644 (1984) ("embracing" the good-faith exception announced in *Leon*); *State v. Bolt,* 142 *Ariz.* 260, 269, 689 *P.*2d 519, 528 (1984) (holding that "exclusionary rule to be applied as a matter of state law is no broader than the federal rule"); *State v. Welch,* 316 *N.C.* 578, 588–89, 342 *S.E.*2d 789, 795 (1986) (declining "to apply exclusionary rule to good-faith violation of the fourth amendment" where search warrant was required but police officer reasonably relied on court order authorizing seizure of blood sample); *People v. Stewart,* 104 *Ill.*2d 463, 477–79, 85 *Ill.Dec.* 422, 428, 473 *N.E.*2d 1227, 1233 (1984) (dictum) (warrants found valid, but court concluding that even assuming defect in affidavits, FBI agents' reasonable and good-faith belief that a search was authorized would "insulate" the searches from a suppression motion), cert. denied, 471 *U.S.* 1120, 105 *S.Ct.* 2368, 86 *L.Ed.*2d 267 (1985); *Blalock v. State,* —*Ind.* ——, ——, 483 *N.E.*2d 439, 444 (1985) (dictum) (court finding probable cause exists but concluding that even if affidavit found deficient, the good-faith exception articulated in *Leon* would render evidence admissible); *and State v. Sweeney,* 701 *S.W.*2d 420, 426 (Mo.1985) (dictum) (assuming *arguendo* that search warrant was invalid, the exclusionary rule would not bar the introduction of evidence seized by

officers who reasonably relied on warrant issued by detached and neutral judge), *with* *People v. Sundling,* 153 *Mich.App.* 277, 290–91, 395 *N.W.*2d 308, 314 (Mich.Ct.App. 1986) (refusing to incorporate the good-faith exception into the Michigan constitution on the ground that it would render the probable-cause requirement "a nullity"); *People v. Bigelow,* 66 *N.Y.*2d 417, 488 *N.E.*2d 451, 458, 497 *N.Y.S.*2d 630, 637 (1985) (declining to adopt good-faith exception on state constitutional grounds because "if the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future"); *Commonwealth v. Upton,* 394 *Mass.* 363, 368–71 and n.5, 476 *N.E.*2d 548, 553–54 and n.5 (1985) (discussing *Leon* but concluding that state statutes bar any judicial consideration of admitting evidence seized pursuant to search warrant issued in the absence of probable cause); *and* *State v. Grawien,* 123 *Wis.*2d 428, 430–33, 367 *N.W.*2d 816, 817–18 (Ct.App.1985) (adopting a good-faith exception to the exclusionary rule would be violative of state constitutional jurisprudence); *see also* *Stringer v. State,* –– *Miss.*, ——, ——, 491 *So.*2d 837, 841–51 (1986) (where Justice Robertson, concurring, rejects *Leon* on state constitutional grounds, maintaining that where State fails to establish probable cause under the *Illinois v. Gates* analysis, the objects seized by virtue of the authority conferred by the search warrant may not be received into evidence).

39 Our colleague, Justice Handler, argues that we should not "metamorphose * * * the exclusionary rule from a common-law doctrine into a constitutional right" since to do so "effectively forecloses the possibility of alternative approaches that might serve to enforce the basic constitutional right." *Post* at 864. We would first observe that the application of the exclusionary rule in New Jersey has never been based on common-law doctrine. Rather, it was mandated by the decision in *Mapp v. Ohio,* supra, 367 *U.S.* 643, 657, 81 *S.Ct.* 1684, 1692–93, 6 *L.Ed.*2d 1081, 1091, holding that "the exclusionary rule is an essential part of the Fourth and Fourteenth Amendments" and thus enforceable against the states through the due process clause. Until today the fourth amendment, applied to the states by the *Mapp* decision, has been the source of New Jersey's exclusionary rule.

Because the Court in *Leon* has diluted the rule by recognizing the good-faith exception, New Jersey's continued application of the exclusionary rule unmodified by the good-faith exception requires a source independent of the fourth amendment. Our holding that the rule is an "integral element of our state-constitutional guarantee that search warrants will not issue without probable cause," *supra* at 856, is nothing more than a candid acknowledgment of the lessons of one hundred years of fourth-amendment jurisprudence beginning with *Boyd v. United States, supra,* 116 *U.S.* 616, 6 *S.Ct.* 524, 29 *L.Ed.* 746. Justice Handler's suggestion that we adopt the exclusionary rule as a common-law principle so as not to "foreclose the possibility of alternative approaches" raises the issue that divided the Court in *Wolf v. Colorado, supra,* 338 *U.S.* 25, 69 *S.Ct.* 1359, 93 *L.Ed.* 1782. There, the Court left the states free to rely on other methods to enforce the fourth amendment that "would be equally effective," *id.* at 31, 69 *S.Ct.* at 1363, 93 *L.Ed.* at 1787, ignoring Justice Murphy's admonition that "there is but one alternative to the rule of exclusion. That is no sanction at all." *Id.* at 41, 69 *S.Ct.* at 1369, 93 *L.Ed.* at 1793. In *Mapp,* the Court, reconsidering the issue, recognized that "[t]he experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States," and concluded that the exclusionary rule is the only satisfactory remedy to vindicate fourth-amendment interests. 367 *U.S.* at 652–54, 81 *S.Ct.* at 1690–91, 6 *L.Ed.*2d at 1088–90. This view was persuasively endorsed by Justice Potter Stewart:

> Taken together, the currently available alternatives to the exclusionary rule satisfactorily achieve some, but not all, of the necessary functions of a remedial measure. They punish and perhaps deter the grossest of violations, as well as governmental policies that legitimate these violations. They compensate some of the victims of the most egregious violations. But they do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations—the frequent infringements motivated by commendable zeal, not commendable malice. For those violations, a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment. There is only one such remedy—the exclusion of illegally obtained evidence. [Stewart, *supra,* 83 *Colum.L.Rev.* at 1388–89.]

Accordingly, we view our conclusion that the exclusionary rule is an integral element of the citizen's freedom from unreasonable searches as reflecting the overwhelming weight of the experience of federal and state courts in attempting to enforce the rights guaranteed by the fourth amendment.

Nevertheless, the application of a constitutional principle need not be immutable. Although our concurring colleague perceives it as "paradoxical," *post* at 170 n.3, we acknowledge the obligation of the judiciary to evaluate carefully the

effect of any legislative or executive initiative intended to afford a source of enforcement distinct from or supplementary to the exclusionary rule. *Cf.* *Miranda v. Arizona,* 384 *U.S.* 436, 467, 86 *S.Ct.* 1602, 1624, 16 *L.Ed.*2d 694, 720 (1966) ("Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual * * *."). The fact that no effective alternative has yet been developed, either at the federal or state level, is what impels our conclusion today that the exclusionary rule is required to enforce the guarantee against unreasonable searches and seizures secured by our State Constitution.

1 It is noteworthy that, in terms of the fourth amendment, since *Mapp* the scope of the exclusionary rule has steadily shrunk. *See, e.g.,* *Alderman v. United States,* 394 *U.S.* 165, 174–75, 89 *S.Ct.* 961, 967, 22 *L.Ed.*2d 176, 187 (1969) (defendants whose fourth-amendment rights had not been violated did not have standing to object to evidence obtained in violation of the rights of others; application of the exclusionary rule should depend on a cost-benefit analysis); *United States v. Calandra,* 414 *U.S.* 338, 351, 94 *S.Ct.* 613, 621, 38 *L.Ed.*2d 561, 573 (1984) (grand-jury witness could not invoke the rule to refuse to answer questions based on evidence seized pursuant to a defective search warrant; the purpose of the rule "is not to redress the injury to the privacy of the search victim [but rather] to deter future unlawful police conduct.").

2 The text of the fourth amendment to the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution are nearly identical. Neither contains any reference to the exclusionary rule.

3 We can appropriately consider the exclusionary rule to have become a part of what one commentator labels the "constitutional common law," "a substructure of substantive, procedural and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions [, rules that are] ... subject to amendment, modification or even reversal by [the legislature]." Monaghan, "Forward: Constitutional Common Law," 89 *Harv.L.Rev.* 1, 2–3 (1975).

4 Paradoxically, the majority professes a willingness to "evaluate carefully" any legislative attempt to develop remedies to preserve the constitutional right. This may imply that if the Legislature ultimately develops a suitable and effective alternative to the exclusionary rule, then this Court has the power to modify or even abandon the rule that it now claims is "constitutional." *Ante* at 856, n. 39. This proposition undermines, if it does not directly contradict, the view that the exclusionary rule has attained the permanence of a constitutional right. The majority, in effect, recognizes the intrinsic nature of the exclusionary rule as a court-crafted remedy designed to deter improper official conduct, and impliedly acknowledges that the remedy can expand or contract in light of changing perceptions of the kind of conduct to which it should be applied. These considerations, I suggest, support the proposition that the exclusionary rule, while it serves a constitutional right, itself is not a constitutional right, but a common-law doctrine, which is always amenable to change and subject to legislative and executive attention.

5 That statute expressly provides for suppression of evidence derived from any intercepted wire or oral communication if the interception was unauthorized or inconsistent with the statute, or if the order of authorization was insufficient. *N.J.S.A.* 2A:156A–21.

6 This position was substantially affirmed in *State v. Catania,* 85 *N.J.* 418, 427 *A.*2d 537 (1981), in which the Court stressed that the Legislature has enacted a strict remedy for failure on the part of police officers to minimize the scope of a wiretap —the exclusionary rule. *Catania* further overruled the earlier case of *State v. Dye,* 60 *N.J.* 518, 291 *A.*2d 825 (1972), which had determined that the legislative exclusionary rule should be given a narrow rather than broad interpretation.

7 The common thread supporting these proposals is that "[t]he task of overseeing and remedying Bill of Rights violations ultimately is a legislative one, and no legal obstacle exists today to prevent the rule's legislative repeal or modification." Gangi, *The Exclusionary Rule: A Case Study in Judicial Usurpation, supra,* 34 Drake L.Rev. at 35.

1 Empirical data on the effects of the exclusionary rule on the disposition of felony warrants are inconclusive. *See* *United States v. Leon, supra,* 468 *U.S.* at 907–08 n. 6, 104 *S.Ct.* at 3413 n. 6, 82 *L.Ed.*2d at 688 n. 6; 468 *U.S.* at 949–52, 104 *S.Ct.* at 3441–42, 82 *L.Ed.*2d at 716–17 (Brennan, J., dissenting). A survey conducted by the Administrative Office of the Courts with respect to suppression motions in ten New Jersey counties during the six-month period of December 1, 1985, to May 31, 1986 discloses that during this period, 80% of the 1082 motions filed involved controlled dangerous substances and 10% involved weapons. Of all the motions filed, 540 or roughly half were disposed of in the following manner: 49% were withdrawn (usually after a plea that mooted the suppression issue); 40% were denied; 4% were dismissed; and

7% were granted (all of which involved searches made without a warrant). The evidence seized in these cases included controlled dangerous substances in 75% of the cases, weapons in 17.1%, and alcohol in the remaining 7.3%. The study suggests that of the estimated 4,500 motions filed in New Jersey annually, approximately 300 are granted.

The study also analyzed the granted motions in five of the ten counties for an additional six-month period and in two of the counties for an additional one-year period. Only one of the 44 suppression motions that were granted during this period involved a search made pursuant to a warrant.

2 The survey conducted by the Administrative Office of the Courts regarding suppression motions, *supra* at 867 n. 1, supports the assumption that judges, in reviewing and granting search warrants, are effectively protecting the constitutional rights of private citizens. The study examined the files on 82 suppression motions that were granted. Only one of these cases involved a search executed with a warrant. The majority interprets these statistics to indicate that the exclusionary rule "poses no significant threat to law-enforcement efforts" *Ante* at 853. I interpret these statistics to indicate that judges are acting properly in reviewing search warrant applications. Under such circumstances there is no reason to think that a good faith exception will encourage judges to ignore the law.

3 For recent cases reaffirming this principle, see *Delguidice v. New Jersey Racing Comm.,* 100 *N.J.* 79, 85, 494 *A.*2d 1007 (1985) ("Deterrence of future unlawful police conduct is the 'prime purpose' of the exclusionary rule, 'if not the sole one,' " quoting *Immigration and Naturalization Serv. v. Lopez-Mendoza,* 468 *U.S.* 1032, 104 *S.Ct.* 3479, 82 *L.Ed.*2d 778 (1984); *State v. Burstein,* 85 *N.J.* 394, 406, 427 *A.*2d 525 (1981) (the exclusionary rule is "meant solely to deter illegal police conduct").

4 The text of the fourth amendment and Article I, paragraph 7, of the New Jersey Constitution are nearly identical. Neither contains any reference to the exclusionary rule.

5 *State v. Macri,* 39 *N.J.* 250, 188 *A.*2d 389 (1963), and *State v. Valentin,* 36 *N.J.* 41, 174 *A.*2d 737 (1961), are cited by the majority as support for this position. In *State v. Macri,* Justice Weintraub, in his concurring opinion, pointed out that the affidavit was so palpably devoid of any basis for evaluation that the magistrate's order was no more than a rubber stamp of the police officer's action. Hence, the good faith exception would not be applicable. In *State v. Valentin,* we remanded the case for reconsideration of a motion to suppress a shotgun recovered in a warrantless search so that the prosecutor who had not submitted proof respecting the circumstances surrounding the search and seizure could do so, because "whether a particular search and seizure are unreasonable depends upon the circumstances under which the police officers acted." *Id.* at 43, 174 *A.*2d 737.

99 F.3d 1372
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of
America, Plaintiff–Appellee,
v.
Gary Lynn WEAVER, Defendant–Appellant.

No. 94–6575.
|
Argued Dec. 5, 1995.
|
Decided Nov. 8, 1996.
|
Rehearing Denied April 7, 1998.

Synopsis

Defendant was convicted in the United States District Court for the Middle District of Tennessee, John T. Nixon, Chief Judge, of unlawful possession of firearms and ammunition by convicted felon. He appealed. The Court of Appeals, Nathaniel R. Jones, Circuit Judge, held that: (1) affidavit submitted by detective did not support issuance of warrant to search defendant's residence, and (2) detective did not rely in good faith on invalid warrant.

Reversed.

Attorneys and Law Firms

***1374** William Cohen, Asst. U.S. Attorney (argued and briefed), Office of the U.S. Attorney, Nashville, TN, for U.S.

Bob Lynch, Jr. (argued and briefed), Nashville, TN, for Gary Weaver.

Before JONES, BATCHELDER, and MOORE, Circuit Judges.

Opinion

NATHANIEL R. JONES, Circuit Judge.

Defendant-appellant Gary Lynn Weaver appeals his conviction for the unlawful possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). For the reasons that follow, we reverse.

I.

On February 23, 1994, a federal grand jury returned a two-count indictment against Gary L. Weaver in the District Court for the Middle District of Tennessee for the unlawful possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), respectively. On April 18, 1994, Weaver filed a motion to suppress the introduction and use of firearms and ammunition seized from his residence during the execution of a search warrant. On August 23, 1994, the district court denied the motion. Trial to a jury occurred on August 30 and 31, 1994. The jury convicted Weaver on both counts. On November 16, 1994, the judge sentenced him to 18 months imprisonment, 3 years supervised release, fines, and costs. This timely appeal followed.

The principal issues on appeal are (1) whether the affidavit presented for issuance of the search warrant contained sufficient particularized facts from which the issuing magistrate could find a substantial basis for probable cause; and, (2) if the affidavit was defective, whether the law enforcement officers acted in good faith reliance on the warrant when executing the search.

II.

A.

In 1986 Weaver pled guilty to the felony charge of illegally engaging in the interstate distribution of explosives without a license. As a condition of his probation, Weaver could not thereafter own or possess firearms or ammunition. After his conviction, Weaver disposed of all but two of the nine rifles he owned. In early May 1993, these two rifles, along with some live ammunition, bullet molds, and other items used in home-loading ammunition, were returned to the Weaver home at 3031 Hartford Drive in Murfreesboro, Tennessee, by a friend who could not afford to purchase them. As Weaver was not present at the time of return, his wife, aware of the probation conditions, instructed the friend to place all the returned items in a detached "outbuilding" located behind the residence, with the intent to dispose of the items herself without informing

Weaver. She did not, however, dispose of the items and they remained in the outbuilding.

Later that month, on May 23, 1993, Detective Mickey McCullough of the Vice Division of the Murfreesboro Police Department received a tip from a known and previously reliable confidential informant, Philip Dinovo, regarding a possible marijuana sales operation occurring on or near Hartford Drive in ***1375** Murfreesboro. Dinovo informed McCullough that he learned of the operation from a third person he knew only as "Charlie." Charlie was not an informant and was unaware of Dinovo's connection to the police. Dinovo said he would attempt to purchase some marijuana with Charlie at the Hartford Drive location. McCullough provided Dinovo with $100 for the purchase and instructed the informant to contact him with the drugs or to return the money. The police did not conduct surveillance of the drug transaction or believe that surveillance was necessary.

At midday on May 25, 1993, Dinovo and McCullough met again. The informant informed McCullough that, on the previous day, he and Charlie went "to the home of Mr. Gary Weaver on Hartford Drive" and jointly purchased one-half ounce of marijuana. J.A. at 136–37. The informant also told the detective that Charlie believed Weaver was growing marijuana at the house, although Dinovo personally observed no indications of a marijuana growing operation. McCullough then drove Dinovo to Hartford Drive, at which time the informant identified the Weaver house as the location of the marijuana purchase. By calling the Murfreesboro Electric Department, McCullough verified that Weaver held the utilities account for the property identified. Although aware of Weaver's prior conviction, McCullough had no prior knowledge connecting Weaver with illegal drugs or drug distribution. The detective took no additional steps to corroborate the informant's story.

Based on this information, McCullough immediately prepared a preprinted form affidavit to obtain a search warrant for the Weaver premises, with the intent "to make a case for the felonious possession of marijuana to keep the identity of the informant anonymous." J.A. at 131.[1] McCullough's preprinted affidavit was composed of boilerplate text with a few open spaces for additional information:

> Personally appeared before *James W. Buckner,* Judge of the Court of *Gen. Session* for Rutherford County, Tennessee the undersigned *Mickey McCullough,* a lawful officer of said County and State, who makes affidavit that there is probable cause to believe, and that affiant does believe, that *Gary Weaver* is now unlawfully keeping a quantity of *marijuana* for the purpose or with the intention of unlawful possession, sale or transportation thereof, and upon his, her or their person, or in his, her, or their possession, custody or control upon premises used, occupied, possessed or controlled by him, her, or them, and which premises are located and described as follows: *A two story brick dwelling house having a city designated street address of 3031 Hartford Drive. Having a two car attached garage and a detached brick building behind the main house having a concrete driveway and a mailbox erected adjacent to said driveway with the numbers 3031 attached to it. Having a city designated street address of 3031 Hartford Drive, M'boro, Ruth. Co. TN.*
>
> Affiant further makes affidavit that on the *25* day of *May,* 19*93,* affiant received information from a reputable and reliable person, whose name and identity have been disclosed to the Judge to whom this application is made, that Affiant verily believes, and accordingly represents to the Court, that the said informer is truthful, reliable and credible, and that the information so given is accurate and reliable, because: (1) the said informer appears to have intelligence and unimpaired physical senses; (2) the said informer appears to affiant to have sufficient personal knowledge or familiarity or experience with the contraband substance herein mentioned to be able to identify the same by sight, smell and other senses, insofar as such identification can usually be made by the human physical senses unaided by laboratory analysis; (3) there has been a previous occasion, or occasions, on which the same informer has given information of violation of law of the state, which information thereafter was found to have been accurate and reliable; (4) that within the last 72 hours said informant was upon the above described premises and while thereon personally ***1376** observed (*Gary Weaver*) having personal possession and control over a quantity of (*marijuana*) being held expressly for the purpose of unlawful distribution. Affiant knows of no reasons why said informer would falsify or fabricate any of the information given. Consequently, affiant believes that all or some portion of the said (*marijuana*) still remains upon the above described premises.

J.A. at 39 (emphasis denotes handwritten information). At some point after 2:00 p.m. that afternoon McCullough presented the affidavit to the judge and may have orally

supplemented the affidavit with additional information. The judge issued the warrant at that time.

At 8:25 p.m. that same evening, McCullough led a team of six officers in executing the warrant. Upon searching the residence and outbuilding, the authorities found a quarter-ounce of marijuana but uncovered no other evidence of possession, distribution, or growth of marijuana on the property. The search team also discovered the rifles, ammunition, and other ammunition-related items left in the outbuilding and arrested Weaver for having these articles in his possession. The authorities did not charge Weaver with any marijuana-related offenses.[2]

Prior to trial, Weaver moved to suppress the evidence taken from his property due to lack of probable cause for the search. The district court denied his motion, finding without discussion that the averments of the affidavit were not false and the search warrant was not defective. J.A. at 72. Weaver contends that the district court erred in denying his motion because McCullough's boilerplate affidavit lacked sufficient particularized facts of criminal activity to justify a search of his residence. Moreover, the appellant argues that McCullough's search could not have been in good faith because the detective was executing a search warrant based on his own insufficient affidavit. Therefore, without either probable cause or a good faith exception to the exclusionary rule, Weaver asserts the evidence seized under the defective warrant should be suppressed.

The government responds that the affidavit included ample factual information to show probable cause, regardless of whether some of the facts were included in preprinted language. Moreover, even if the affidavit and warrant were defective, the government argues the authorities acted in good faith reliance on the judge's neutral and detached determination of probable cause. Therefore, the government contends that the evidence discovered in the search should be admitted.

B.

When reviewing decisions on motions to suppress, this court will uphold the factual findings of the district court unless clearly erroneous, while legal conclusions are reviewed *de novo*. *United States v. Leake,* 998 F.2d 1359, 1362 (6th Cir.1993). When the district court itself is a reviewing court, as in this case, this court owes the district court's conclusions no particular deference. *Id.* at 1362–63 (citations omitted).

In *Illinois v. Gates,* the Supreme Court established that a warrant must be upheld as long as the "magistrate had a 'substantial basis for ... concluding' that a search would uncover evidence of wrongdoing...." 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983); *United States v. Pelham,* 801 F.2d 875, 877–78 (6th Cir.1986), *cert. denied,* 479 U.S. 1092, 107 S.Ct. 1305, 94 L.Ed.2d 160 (1987). This court pays great deference to the determinations of probable cause made by a state magistrate, whose findings "should not be set aside unless arbitrarily exercised." *Pelham,* 801 F.2d. at 877 (citing *United States v. Swihart,* 554 F.2d 264, 270 (6th Cir.1977)). Yet, "the court must ... insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for police." *Aguilar v. Texas,* 378 U.S. 108, 111, 84 S.Ct. 1509, 1512, 12 L.Ed.2d 723 (1964). As such, "[d]eference to the [issuing] magistrate ... is not boundless." ***1377** *United States v. Leon,* 468 U.S. 897, 914, 104 S.Ct. 3405, 3416, 82 L.Ed.2d 677 (1984).

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,...." U.S. C onst. amend. IV. The protections of personal privacy and property embodied in the amendment require that probable cause "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1947). For the magistrate to be able to properly perform this official function, the affidavit presented must contain adequate supporting facts about the underlying circumstances to show that probable cause exists for the issuance of the warrant. *Whiteley v. Warden,* 401 U.S. 560, 564, 91 S.Ct. 1031, 1034–35, 28 L.Ed.2d 306 (1971); *Nathanson v. United States,* 290 U.S. 41, 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933). These supporting facts need not be based on the direct knowledge and observations of the affiant, but may also come from hearsay information supplied by an informant. *Jones v. United States,* 362 U.S. 257, 269–70, 80 S.Ct. 725, 735–36, 4 L.Ed.2d 697 (1960). From whatever source, the information presented must be sufficient to allow the official to independently determine probable cause; "his action cannot be a mere ratification of the bare conclusions of others." *Gates,* 462 U.S. at 239, 103 S.Ct. at 2333.

In a case involving an anonymous tip, the *Gates* Court established a "totality of the circumstances" test for determining probable cause:

> 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.

462 U.S. at 238, 103 S.Ct. at 2332. Although rejecting the previous two-pronged "veracity" and "basis of knowledge" test fashioned in the cases of *Aguilar v. Texas, supra,* and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), the Court stressed that these factors remain highly relevant in the new analysis. *Gates,* 462 U.S. at 230, 103 S.Ct. at 2328; *Pelham,* 801 F.2d at 877. Moreover, the *Gates* Court maintained that the formerly independent factors should be considered together, emphasizing that a deficiency in one area could be counterbalanced by a "strong showing" in the other:

> If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activity in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip.

462 U.S. at 233, 103 S.Ct. at 2329–30.

The present affidavit is based almost entirely on hearsay information supplied by a previously reliable confidential informant. This court applies the *Gates* "totality of the circumstances" analysis to cases involving known, reliable informants. *E.g., United States v. Smith,* 783 F.2d 648, 650–51 (6th Cir.1986). In so doing, we recognize that two factors are critical to determining whether an affidavit based on a confidential informant's tip provides a "substantial basis" for finding probable cause: (1) an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles [the informant's tip] to greater weight than might otherwise be the case"; and, (2) corroboration of the tip through the officer's independent investigative work is significant. *United States v. Sonagere,* 30 F.3d 51, 53 (6th Cir.) (citing *Gates,* 462 U.S. at 234, 244, 103 S.Ct. at 2330, 2335), *cert. denied,* 513 U.S. 1009, 115 S.Ct. 531, 130 L.Ed.2d 434 (1994).

Weaver argues that the affidavit presented was a "bare bones" composition of boilerplate language, with few particularized facts linking this suspect and his residence to illegal drugs or any other criminal activities. The government responds that preprinted boilerplate language can support probable cause as long as there are sufficient particularized ***1378** facts presented. An affidavit that states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge, is a "bare bones" affidavit. *See Aguilar,* 378 U.S. at 114, 84 S.Ct. at 1514. In determining whether an affidavit is "bare bones," the reviewing court is concerned exclusively with the statements contained within the affidavit itself. *Whiteley,* 401 U.S. at 564–65, 91 S.Ct. at 1034–35; *United States v. Hatcher,* 473 F.2d 321, 323 (6th Cir.1973).[3] As we are aware that "affidavits are 'normally drafted by nonlawyers in the midst and haste of a criminal investigation,' " we remain cautious not to interpret the language of affidavits in a "hypertechnical" manner. *Pelham,* 801 F.2d at 878 (citing *United States v. Ventresca,* 380 U.S. 102, 108–09, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965)). Nevertheless, it is imperative that affidavits accurately reflect the facts of the particular situation at hand. *United States v. Richardson,* 861 F.2d 291, 294–95 (D.C.Cir.1988), *cert. denied,* 489 U.S. 1058, 109 S.Ct. 1325, 103 L.Ed.2d 593 (1989). The use of generalized boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct engenders the risk that insufficient "particularized facts" about the case or the suspect will be presented for a magistrate to determine probable cause. *See In re Young,* 716 F.2d 493, 500 (8th Cir.1983) (holding unacceptable an FBI affidavit of "broad, boilerplate statement describing in a general way" applications, reports, and records commonly kept in bail bond operation); *see also United States v. Barham,* 595 F.2d 231, 246 (5th Cir.1979), *cert. denied,* 450 U.S. 1002, 101 S.Ct. 1711, 68 L.Ed.2d 205 (1981) (characterizing sufficient affidavit as "honest and straightforward recitation (unadorned by the boilerplate so frequently and woodenly inserted to satisfy Fourth Amendment standards in the most artificial fashion)"); *contra United States v. Romo,* 914 F.2d 889, 898 (7th Cir.1990) ("As long as there is sufficient information to provide probable cause for the search, the fact that the affidavit is partially pre-printed is irrelevant."), *cert. denied,* 498 U.S. 1122, 111 S.Ct. 1078, 112 L.Ed.2d 1183 (1991).

Reading this affidavit in a "practical, common-sense" manner, the only claim of possible wrongdoing is the averment that, within three days prior to the affidavit date, the informant was on the suspect premises and, while there, he saw some quantity of marijuana "expressly for the purpose of unlawful distribution." J.A. at 39. McCullough presents no underlying factual circumstances to support

the informant's knowledge regarding distribution, nor the detective's own "belief" that these quantities of marijuana were present "for the purpose or with the intention of unlawful possession, sale or transportation," or even that marijuana would be on the premises when the warrant was executed. *Id.* The government asks us to recognize that McCullough did not include additional drug-related information in the affidavit, including the circumstances of the drug transaction between Weaver and Dinovo, because to do so would have tipped Weaver off to the identify of the informant and possibly jeopardize the informant's safety. A limited privilege exists to withhold information which could identify an informant. *United States v. Jenkins,* 4 F.3d 1338, 1340 (6th Cir.1993), *cert. denied,* —— U.S. ——, 114 S.Ct. 1547, 128 L.Ed.2d 197 (1994). Nevertheless, particularized facts regarding alleged wrongdoing that did not identify Dinovo could have been discovered and included in the affidavit without necessarily jeopardizing the identity of the informant.[4] From this affidavit, all other information that the government cites as particularized facts, that is, the suspect's name, address, and description of the residence, could arguably be obtained by any ***1379** person passing the Weaver house. As presented, the combined boilerplate language and minimal handwritten information provide few, if any, particularized facts of an incriminating nature and little more than conclusory statements of affiant's belief that probable cause existed regarding criminal activity.

Nevertheless, we bear in mind that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts ... [in which] '[i]nformants' tips, like all other clues and evidence ... may vary greatly in their value and reliability.' " *Gates,* 462 U.S. at 232, 103 S.Ct. at 2329 (citing *Adams v. Williams,* 407 U.S. 143, 147, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612 (1972)). Moreover, the circumstances of each case are unique. *See Leon,* 468 U.S. at 918, 104 S.Ct. at 3418 (suppression of evidence obtained pursuant to warrant must be addressed on case-by-case basis). Consequently, it is possible that weak factual information may be bolstered if the authorities undertook probative efforts to corroborate an informant's claims through independent investigations. *Gates,* 462 U.S. at 242, 103 S.Ct. at 2334.[5]

Regarding the reliability of this informant, the affidavit states that McCullough was relying on an informant who could identify marijuana and who on "occasion, or occasions, ... [had] given information of violation of law of the state, which information thereafter was found to have been accurate and reliable." J.A. at 39. There is no indication in this affidavit that this informant provided reliable information in the past leading to drug-related arrests or prosecutions. More important, however, is that McCullough possessed only Dinovo's tip linking Weaver to possible drug activities, yet undertook no substantive independent investigative actions to corroborate his informant's claims, such as surveillance of the Weaver residence for undue traffic or a second controlled purchase made with officers viewing. The discovery of the utilities account holder, by itself, is insignificant. *See United States v. Gibson,* 928 F.2d 250, 252–53 (8th Cir.1991) (insufficient showing of probable cause when officer only corroborated "innocent details" of utility records for account name, revenue agency for physical description, and car titles, and "[t]here was neither surveillance nor observation of unusual civilian or vehicular traffic at the address, nor were there very short visits characteristic of drug trafficking.")

Thus, even assuming the reliability of Dinovo as an informant, our review of this affidavit reveals a paucity of particularized facts indicating that a search of the Weaver residence "would uncover evidence of wrongdoing." *Gates,* 462 U.S. at 236, 103 S.Ct. at 2331. In sum, we hold that, when viewed in the totality of the circumstances, this "bare ***1380** bones" affidavit failed to provide sufficient factual information for a finding of probable cause. Therefore, our inquiry turns to whether exclusion of the items seized during the search is appropriate.

C.

The government contends that even if the warrant was issued without a showing of probable cause, McCullough relied on the warrant's validity in good faith, thus raising an exception to the exclusionary rule, as announced in *United States v. Leon, supra.* In *Leon,* the Supreme Court held that the exclusionary rule "should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." 468 U.S. at 905, 104 S.Ct. at 3411. The Court noted, however, four specific situations where the good faith reliance exception was inappropriate: first, if the issuing magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," *id.* at 914, 104 S.Ct. at 3416; second, if "the issuing magistrate wholly abandoned his judicial role," *id.*; third, if the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *id.* at 915, 104 S.Ct. at

3416–17 (citations omitted), or in other words, where "the warrant application was supported by [nothing] more than a 'bare bones' affidavit," *id.*; and, fourth, if the "warrant may be so facially deficient—i.e., failing to particularize the place to be searched or the things to be seized ...," *id.* at 923, 104 S.Ct. at 3421 (citations omitted).

Regarding the third situation, Weaver asks this court to apply the Fifth Circuit's reasoning in *United States v. Barrington,* 806 F.2d 529 (5th Cir.1986). Drawing from the Supreme Court's note in *Leon* that "[n]othing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search," 468 U.S. at 923 n. 24, 104 S.Ct. at 3420 n. 24, the Fifth Circuit extrapolated that an officer who submitted an insufficient "bare bones" affidavit to the magistrate, and then executed the resulting warrant himself, could not have acted in objective good faith reliance on the warrant. 806 F.2d at 532. The government avers that *Barrington* is distinguishable, as McCullough presented significantly more information in his affidavit than the officer in that case.[6]

Although the Fifth Circuit's reasoning appears to be a logical extension of *Leon,* the threshold question is one of reasonableness: whether the "reliance on the validity of the warrant was objectively reasonable, that is, 'whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.' " *Leake,* 998 F.2d at 1366 (quoting *Leon,* 468 U.S. at 922 n. 23, 104 S.Ct. at 3420 n. 23). Viewed objectively, McCullough possessed some information from a previously reliable informant regarding possible criminal activities but 1) possessed no prior personal knowledge of any unlawful activity by this suspect, or at the suspect residence, other than an old conviction on completely unrelated circumstances; 2) possessed no present personal knowledge of any connection between this suspect and marijuana possession or distribution; 3) had not personally seen any marijuana at the suspect residence nor conducted any visual reconnaissance of the property to determine whether marijuana was likely to be present on the property; and 4) possessed only third-party hearsay information about a possible marijuana grow operation on the property. With little firsthand information and no personal observations, McCullough should have realized that he needed to do more independent investigative work to show a fair probability that this suspect was either possessing, distributing, or growing marijuana. *Cf. United States v. Broussard,* 80 F.3d 1025, 1034 (5th Cir.1996) (holding preprinted boilerplate affidavit reciting ***1381** generalizations about evidence in drug dealer's residence, without more information, insufficient to render officers' reliance objectively reasonable). Had the detective made some meaningful "effort to corroborate the informant's report at issue, 'an entirely different case' would have been presented." *Gates,* 462 U.S. at 242, 103 S.Ct. at 2334 (citing *Aguilar,* 378 U.S. at 109 n. 1, 84 S.Ct. at 1511 n. 1). We believe a reasonably prudent officer would have sought greater corroboration to show probable cause and therefore do not apply the *Leon* good faith exception on the facts of this case.[7] Accordingly, the items seized at the Weaver residence should be suppressed.

III.

"The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment —is basic to a free society." *Wolf v. Colorado,* 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949). The Fourth Amendment does not require an officer to reinvent the wheel with each search warrant application. Nevertheless, because of the threat of generalization when particular facts are necessary, we remain concerned about boilerplate language in affidavits or search warrants. *See United States v. Brown,* 49 F.3d 1162, 1175 (6th Cir.1995) (Batchelder, J., dissenting) (preprinted boilerplate language is insufficient for "suitable words of reference" required for incorporation of affidavit in search warrant). It takes but a few minutes more for law enforcement authorities to obtain and include sufficient particularized facts so that magistrates may perform their detached function fully informed. *United States v. Schauble,* 647 F.2d 113, 116 (10th Cir.1981). Such time was not taken in this case.

For the foregoing reasons, the district court's denial of the motion to suppress is REVERSED.

All Citations

99 F.3d 1372, 1996 Fed.App. 0354P

Footnotes

1 McCullough testified that he never planned to charge Weaver on the misdemeanor marijuana sale to Dinovo. J.A. at 120.

2 Weaver purchased the discovered marijuana a few days before the execution of the search warrant, apparently for personal use. McCullough testified that he declined to charge Weaver on this misdemeanor possession violation. J.A. at 131.

3 The government's attempt to bolster McCullough's initial affidavit through a second, more-detailed affidavit and testimony at the suppression hearing are without merit. Due to the brevity of the district court's order, there is no way for this court to determine the extent to which the district court relied on the additional information in its deliberations.

4 For instance, a description of the marijuana and how it was maintained, identifying aspects of the location in the residence where the marijuana or distribution paraphernalia was seen or kept, a description of Weaver, information on the distribution operation, etc. could have been elicited from the informant, either at the time of this transaction or over the course of a surveillance.

5 Panels of this court have differed on the need for corroboration in situations regarding tips from known, reliable informants. For instance, in *United States v. Smith,* this court considered the following affidavit prepared from the tip of a known, confidential informant who had provided reliable information in the past:

> On the 20th day of August, 1984, at approximately 5:00 p.m., the affiant received information from a reliable informant that Eric Helton was producing marijuana at his residence. Acting on the information received, affiant conducted the following independent investigation: On August 21, 1984 at 11:30 a.m. Detective William Stweart [sic] observed a marijuana plant growing beside the residence of Eric Helton.

783 F.2d at 649. The panel found that the affidavit "though sketchy" appeared to satisfy the *Gates* test, stating twice, however, that the informant's tip alone would not have been sufficient, even though the informant was known and had provided reliable information in the past. *Id.* at 650, 651. The crucial information the court relied upon in upholding the affidavit was the corroboration of the growing plant. *Id.* at 651; *Leake,* 998 F.2d at 1365.

Subsequently, in *United States v. Finch,* this court addressed a defense challenge to the following search warrant affidavit as "conclusory":

> [A]ffiant has talked with a reliable informant of Memphis, Shelby County, Tennessee who has given the affiant other information in the past which has been found to be true and correct, and which has resulted in several narcotic arrests and drug seizures. This reliable informant stated that within the past five (5) days of January 19, 1991, this reliable informant has been inside the above described residence and has seen the above described person storing and selling Cocaine inside this residence.

998 F.2d 349, 352 (6th Cir.1993). In upholding the affidavit, the *Finch* court did not address whether corroboration was necessary, finding that the authorities had provided "a statement of the affiants' reasons for their belief as to the existence of probable cause." *Id.*

6 The *Barrington* affidavit "stated only that Captain Solomon 'received information from a confidential informant' who is 'known to Captain Phil Solomon and has provided information in the past that has led to arrest and convictions.' " 806 F.2d at 531.

7 Because this kind of pre-printed affidavit form had been in use for a substantial period of time in Murfreesboro and apparently had the blessing of the local prosecutor and General Sessions Judge, we think it is important to stress that in the situation at hand, Officer McCullough should have recognized that he did not even possess sufficient factual information to constitute probable cause.

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