1984

State of Utah v. James D. Chambers, Stanley Ned Jacobsen and J.D. (Last Name Unknown) : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19151 Case No. 19152
JAMES D. CHAMBERS, STANLEY NED JACOBSEN, and J.D. (last name unknown),	:	
Defendants-Appellants.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT RENDERED IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SUMMIT COUNTY, UTAH, THE HONORABLE J. DENNIS FREDERICK, JUDGE, PRESIDING.

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STATEMENT OF THE NATURE OF THE CASE

Appellants, James Chambers and Stanley Jacobsen, were charged with burglary, a second degree felony, under Utah Code Ann. § 76-6-202 (1978), and theft, a second degree felony, under Utah Code Ann. § 76-6-404 (1978).

DISPOSITION IN THE LOWER COURT

After a jury trial on March 8 and 9, 1983 in the Third Judicial District Court in and for Summit County, the Honorable J. Dennis Frederick, Judge, presiding, appellants were found guilty of burglary and theft. Both were sentenced to the Utah State Prison for a term of 1-15 years for the former offense and for a term of 1-15 years for the latter offense, the sentences to run consecutively.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgments and sentences of the trial court.

STATEMENT OF FACTS

On January 6, 1983, officers from the Park City Police Department were contacted by an informant who told them that a burglary had taken place in the Park City area and that he knew who had committed the crime. He mentioned that stereos with speakers, video cassettes, televisions, and clothing were taken in the burglary (T. 59). The informant then directed the officers to James Chambers's residence in Salt Lake City, which he identified as the home of the persons who had committed the crime (T. 59-60, 110).

The next night, pursuant to arrangements made by the informant, Detective Pirraglio, who posed as a prospective buyer, met with appellants and the informant at the informant's apartment (T. 65-67). Before leaving the apartment to examine merchandise in the trunk of appellants' car, appellants checked for a police car they believed was in the area (T. 68). Appellants then took Detective Pirraglio to the car and showed him a VCR, which he subsequently purchased for $200 (T. 69-71).

That same night, Richard Thompson returned to his Summit Park residence and discovered that it had been burglarized (T. 13). Among the items he reported missing were a Sony VCR, a cassette deck, stereo equipment, a leather coat, a pistol, and a pair of Tony Lama cowboy boots (T. 20-23; State's Exhibit 9 [see R. 115]). When officers brought the video recorder purchased from appellants earlier that even-

to Mr. Thompson's residence, he was able to identify it as the one missing from his home (T. 27).

On January 10, 1983, officers, with a search warrant, searched Chambers's residence and seized a pistol and a pair of cowboy boots (T. 108-113). James Chambers and Stanley Jacobsen, who was staying in the Chambers's home at the time (T. 155, 186-187), were both present during the search (T. 110). At trial, Richard Thompson identified the pistol and boots as those stolen from his residence (T. 25-26). Thompson did not know appellants and never gave them permission to enter his home or to possess his personal belongings (T. 24-25).

After a pretrial hearing on February 22, 1983, the trial court denied appellants' motion to suppress evidence seized pursuant to the search warrant and their motion to require the state to disclose the identity of a confidential informant (R. 103-104, 107-108).

Both appellants filed a notice of alibi (R. 87-88, 99-101). The alibi testimony presented at trial sought to establish the whereabouts of appellants during the time period the crime would have been committed (T. 150-157, 175-179). Appellants also presented evidence in an effort to explain their possession of the VCR, the pistol, and the cowboy boots (T. 157-158, 196-202).

ARGUMENT

POINT I

BECAUSE APPELLANTS FAILED TO MAKE A SPECIFIC OBJECTION AT TRIAL TO THE ADMISSION OF THE EVIDENCE NOW CHALLENGED ON APPEAL, APPELLATE REVIEW OF THE ADMISSIBILITY OF THAT EVIDENCE IS NOT AVAILABLE; ALTERNATIVELY, THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION TO SUPPRESS THE EVIDENCE.

Appellants contend that the denial of their pretrial motion to suppress the evidence seized pursuant to the search warrant was error. Under Rule 4 of the Utah Rules of Evidence (1971), in effect at the time of appellants' trial, a specific objection to the admission of evidence is required at trial even when a pretrial motion to suppress has been made; and the absence of such an objection precludes appellate review of the admissibility of the challenged evidence. State v. Lesley, Utah, 672 P.2d 79, 81-82 (1983). Appellants failed to make a specific, record objection at trial to the admission of the evidence whose admissibility they now challenge on appeal. Based on Lesley, the issue therefore has not been preserved for appeal. Furthermore, "the facts are not such that great and manifest injustice would be done if this Court does not entertain the issue sua sponte as an exception." Lesley, 672 P.2d at 81-82, quoting State v. Pierce, Utah, 655 P.2d 676, 677 (1982).

If, however, the Court is inclined to address the issue, appellants' arguments are without merit. When the

trial court denied appellants' motion to suppress, which argued that the affidavit supporting the search warrant was insufficient, the United States Supreme Court had not yet issued its opinion in Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317 (1983). In reaching its decision, the trial court applied the standards set forth in Aguilar v. Texas, 378 U.S. 108 (1964),and Spinelli v. United States, 393 U.S. 410 (1969). In Gates, the Supreme Court abandoned its rigid "two-pronged test" under Aguilar and Spinelli for determining whether an informant's tip establishes probable cause for issuance of a warrant, and substituted the traditional "totality of circumstances test" in its place. Appellants concede that if the "totality of circumstances test" is applied in their case, the affidavit in support of the search warrant is sufficient. However, they argue that Gates should not apply because that case is to have prospective application only. They are apparently taking the position that Gates does not apply to cases, like theirs, where a search warrant was issued and executed prior to the date of the Supreme Court's decision. However, appellants cite no authority in support of this position.

Nowhere in the Gates opinion is there even a suggestion that the ruling is to have prospective application only. Numerous courts have applied the totality of the circumstances test reaffirmed in Gates to defendants challenging the validity of warrants issued and executed prior

to Gates. See, e.g., United States v. Figueroa, 720 F.2d 1239, 1243-1244 (11th Cir. 1983); United States v. Sorrell, 714 F.2d 1522, 1526-1529 (11th Cir. 1983); In re Grand Jury Proceedings, 716 F.2d 493, 500-502 (8th Cir. 1983); English v. Sava, 571 F. Supp. 1029, 1042-1043 (S.D.N.Y. 1983); State v. Rose, Kan. App., 665 P.2d 1111, 1113-1115 (1983). Significantly, this Court in State v. Anderton, Utah, 668 P.2d 1258 (1983) (an appeal which was pending when Gates was decided), did not hesitate to rely on Gates as providing "further support for the conclusion . . . that probable cause existed for the issuance of the search warrant." Anderton, 668 P.2d at 1258.

In sum, there is nothing in Gates or the relevant decisions from this and other jurisdictions to indicate that the totality of circumstances test should not apply to appellants' case. To the contrary, those decisions make clear that that test properly applies here. Therefore, as conceded by appellants, under the Gates analysis, the affidavit in support of the search warrant was sufficient.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' REQUEST FOR DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT; ALTERNATIVELY, FAILURE TO REQUIRE DISCLOSURE WAS HARMLESS.

The trial court denied appellants' pretrial motion to require the state to disclose the identity of the confidential informant who supplied information to police officers in this case. Appellants claim that this denied them due process of law. They rely on language in State v. Forshee, Utah, 611 P.2d 1222 (1980), to support this conclusion:

> As noted in Forshee:
>
> There are two exceptions to the general privilege of nondisclosure of an informer's identity. Disclosure is required (1) when the informer's identity is already known, and (2) when disclosure is essential "to assure a fair determination of the issues."

611 P.2d 124 (footnote omitted). That case also recognized the general rule that "an informer who was a witness to the crime with which the accused was charged or who was an actual participant in the commission of the alleged crime is subject to an order of disclosure." 611 P.2d at 1225 (citations omitted). Appellants rely most heavily on this latter rule, arguing that their request for disclosure should have been granted because the informant was more than a mere informer and actually took an active part in the crime. However, the

informant was neither a witness nor a participant in the crime with which appellants were charged. They were charged with burglary and theft arising out of the burglary of Richard Thompson's residence, an incident the informant did not witness or participate in; they were not charged with any crimes as a result of their sale of Thompson's VCR to Detective Pirraglio, a transaction admittedly witnessed and participated in by the informant. Therefore, disclosure was not required on the ground presented by appellants.

Moreover, as in Forshee, it appears appellants knew the identity of the informant, and thus the court's failure to require disclosure, if error, is at best harmless error. Detective Pirraglio's testimony at trial made clear that the informant knew appellants and that they knew him, that the informant personally made the arrangements with appellants for the sale of the VCR, that Pirraglio's meeting with appellants was at the informant's apartment, and that the informant was the only other person present when the VCR was sold. From that alone, the identity of the informant must have been obvious. Further support for the conclusion that appellants knew the informants's identity is found at page 87 of the trial transcript where the following exchange between Mr. Brown (Chambers's counsel) and Pirraglio is recorded:

Q. Did the confidential informant ever tell you his name?

A. Never told me his name.

Q. So you wouldn't know his name?

A. Only his first name.

Q. It's true, is it not, that his first name is Bob:

A. That's true

Q. You didn't inquire as to his last name?

A. I didn't at the time, no.

Finally, it appears appellants made no attempt to subpoena the informant for the purpose of testifying. Thus, under these circumstances, if any error were committed by the trial court, it was not prejudicial.

POINT III

UTAH CODE ANN. § 76-6-402(1)(1978) AND THE TRIAL COURT'S INSTRUCTION BASED ON THAT STATUTE ARE CONSTITUTIONALLY SOUND.

Appellants contend that Utah Code Ann. § 76-6-402(1)(1978), which provides that "[p]ossession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property," is unconstitutional on its face because it penalizes a defendant for exercising his constitutional right to remain silent (see

Appellant's Brief at p.7). However, they cite no authority in support of this position.

It appears that Barnes v. United States, 412 U.S. 837 (1973), is dispositive of the issue raised by appellants. There the Court determined that the following jury instruction was constitutional: "Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." The Court held that the traditional common law inference that guilty knowledge may be drawn from the fact of unexplained possession of stolen goods satisfied due process standards. In short, "[s]ince the inference . . . satisfies the reasonable doubt standard, the most stringent standard the Court has applied in judging permissive criminal law inferences, . . . it satisfies the requirements of due process." Barnes, 412 U.S. at 846. The Court also reaffirmed its prior rulings that the inference does not infringe upon a defendant's privilege against self-incrimination. Id. Under the Barnes analysis, § 76-6-402, which contains language very similar to that of the instruction addressed in Barnes, does not penalize a defendant for exercising his right to remain silent and is therefore not unconstitutional on its face.

Finally, the Barnes Court noted that the instruction "'cannot be fairly understood as a comment on the petitioner's failure to testify.'" 412 U.S. at 846 n. 12, citing United States v. Gainey, 380 U.S. 63, 70-71 (1965). Accordingly, appellant Chambers's argument that Instruction No. 18 (R. 145)[1], which incorporated the language of § 76-6-402(1), improperly commented on his failure to testify is without merit. The conclusion of Gainey can logically be extended to defeat Chambers's additional argument that the instruction improperly comments on his post-arrest silence. His citations to State v. Wiswell, Utah 639 P.2d 146 (1981), and Doyle v. Ohio, 426 U.S. 610 (1976), are inapposite to the issue he raises here.

POINT IV

THE JURY INSTRUCTION THAT POSSESSION OF PROPERTY RECENTLY STOLEN, WHEN NO SATISFACTORY EXPLANATION OF SUCH POSSESSION IS MADE, SHALL BE DEEMED PRIMA FACIE EVIDENCE THAT THE PERSON IN POSSESSION STOLE THE PROPERTY, DID NOT SHIFT THE BURDEN OF PERSUASION TO APPELLANTS, NOR DID IT CREATE AN IRREBUTTABLE PRESUMPTION.

Jury Instruction No. 18 (R. 145) reads:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

[1] Although the jury instructions contained in the record are not designated by number, it appears that appellants' reference to "Jury Instruction No. 18" is reference to the instruction at R. 145.

> Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

Appellants contend this instruction creates an irrebuttable presumption of guilt and impermissibly shifted the "burden of going forward with some evidence regarding recent possession" (Appellants' Brief at p.9). Although appellants refer to shifting of the burden to go forward with evidence, their reliance on Sandstrom v. Montana, 442 U.S. 510 (1979), and State v. Walton, Utah, 646 P.2d 689 (1982), suggests that they are actually arguing that the instruction impermissibly shifted the burden of persuasion. This latter argument and the one relating to creation of an irrebuttable presumption were rejected by this Court in State v. Asay, Utah, 631 P.2d 861 (1981):

> While the burden of persuasion may not be shifted to the defendant, to suggest that either the instruction given or the statute which supports it does so, is to misconstrue the nature of the statute's application. Under the statute, proof of possession of recently stolen property by defendant constitutes only prima facie evidence of a further element of the alleged offense, i.e., the identity of defendant as the thief. "Prima facie evidence" is commonly defined as "[s]uch evidence as, in the judgment of the law is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or depose, and which if not rebutted or contradicted, will remain sufficient," or more simply as a "sufficiency of evidence to go to the jury." Thus, in the case at hand, a

> showing by the state that defendant was in possession of the automobile, coupled with an unsatisfactory explanation of such possession, is sufficient, without more, to defeat a claim that the state failed as a matter of law to establish defendant's identity as the thief. The statute does not operate to create a presumption, permissive or otherwise, regarding the credibility or weight of the evidence so created; such lies within the province of the jury. The instruction adequately communicates this by pointing out that, upon finding that defendant had possession of the automobile, and that his explanation therefor was unsatisfactory, that the jury may regard defendant as the guilty person. We therefore find no error in the instruction as given.

631 P.2d at 863-864.

Accordingly, Instruction No. 18, which recites verbatim § 76-6-402(1), did not, as appellants argue, violate the presumption of innocence which cloaks all criminal defendants or impermissibly shift the burden of persuasion to appellants.

POINT V

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT APPELLANTS' CONVICTIONS.

Appellants contend that because there was no direct evidence putting them in Summit County at the time of the commission of the crime with which they were charged, coupled with the unrebutted alibi evidence presented at trial, the evidence was insufficient to support their convictions. When considering an insufficiency of evidence claim, this Court has

applied the following standard of review:

> This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt. State v. Asay, Utah, 631 P.2d 861 (1981); State v Lamm, Utah, 606 P.2d 229 (1980); State v. Gorlick, Utah, 605 P.2d 761 (1979); State v. Logan, Utah, 563 P.2d 811 (1977). We also view in a light most favorable to the jury's verdict those facts which can be reasonably inferred from the evidence presented to it.

State v. McCardell, Utah, 652 P.2d 942, 945 (1982). "Circumstantial evidence alone may be competent to establish the guilt of the accused." State v. Clayton, Utah, 646 P.2d 723, 725 (1982).

The state presented evidence establishing that appellants sold Richard Thompson's VCR unit to Dectective Pirraglio, and that Richard Thompson's pistol and cowboy boots were discovered in a search of appellant Chambers's home. All those items had been recently stolen from Thompson's residence. Although appellants presented some evidence in an attempt to explain their possession of those recently stolen items (See T. 157-158, 196-202), the credibility of that evidence was seriously undermined on cross-examination (See T. 162-167, 226-238).

Admittedly, the prosecution was aided by the permissive presumption provided in § 76-6-402(1), which

applies to burglary as well as to theft. State v. Sessions, [illegible], 583 P.2d 44, 45-46 (1978). Because of that presumption, direct evidence placing appellants in Summit County at the time of the crime was not required. As noted in Sessions:

> [P]ossession of articles recently stolen, when coupled with circumstances inconsistent with innocence, such as . . . making a false or improbable or unsatisfactory explanation of the possession, may be sufficient to connect the possessor with the offense of burglary and justify his conviction of it.

583 P.2d at 46, quoting State v. Thomas, 121 Utah 639, 641, 244 P.2d 653, 654 (1952).

Finally, appellants' claim that their unrebutted alibi evidence further compels a finding that the evidence was insufficient to support their convictions, is without merit. First, the alibi evidence in no way conclusively established that appellants were not or could not have been at Richard Thompson's residence in Summit County during the period in which the crime occurred (see T. 150-157, 175-179). It consisted of little more than testimony from appellant Chamber's wife and James Wilcox that Chambers spent some time in the hospital in the early part of January, 1983, that Chambers remained in bed for some time after returning home from the hospital, that appellant Jacobsen was staying in the Chambers residence, and that Jacobsen spent several long evenings at Wilcox's residence in early January.

Moreover, a jury is not required to accept alibi testimony even though not contradicted by other witnesses' evidence. State v. Poland, 132 Ariz. 269, 645 P.2d 784, 790, (1982); State v. Darrah, 435 P.2d 914, 918 (1968). This is consistent with this Court's statement in State v. Howell, Utah, 649 P.2d 91, 97 (1982), that the trier of fact is not obligated to believe the evidence most favorable to the defendant rather than that presented in opposition by the state.

Because the evidence adduced at trial, viewed in the light most favorable to the verdict, was not so lacking and insubstantial that the jury must have entertained a reasonable doubt that appellants were guilty of the offenses with which they were charged, appellants' insufficiency of evidence claim should be rejected and their convictions affirmed.

CONCLUSION

Based upon the foregoing, the judgments and the sentences of the trial court should be affirmed.

RESPECTFULLY submitted this 7th day of May, 1984.

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May 8, 1985

Mr. Geoffrey J. Butler
Clerk of the Utah Supreme Court
332 State Capitol
Salt Lake City, Utah 84114

Re: State v. Chambers, Stanley Ned Jacobsen, and J. D. (last name unknown), No. 19151 and No. 19152

Dear Mr. Butler:

I have attached a copy of Massachusetts v. Upton, ____ U.S. ____, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984), as supplemental authority that is supportive of the State's argument in Point I of its brief in State v. Chambers, et al.

This supplemental authority is submitted pursuant to Rule 24(j), Utah Rules of Appellate Procedure (1985).

Sincerely,

Dave B. Thompson

DAVE B. THOMPSON
Assistant Attorney General

DBT:mm

Attach.

cc: Kenneth R. Brown
J. Bruce Savage, Jr.

MAY 10 1985

MASSACHUSETTS, Petitioner

v

GEORGE UPTON

— US —, 80 L Ed 2d 721, 104 S Ct —

[No. 83–1338]

Decided May 14, 1984.

Decision: "Totality of circumstances" held proper standard for determining probable cause for issuance of search warrant based on information from informant.

SUMMARY

Evidence discovered through a search conducted pursuant to a warrant, for which probable cause was established to the satisfaction of the issuing magistrate on the basis of a police officer's affidavit recounting an informant's tip as to the location of stolen property, led to the conviction of a defendant on multiple counts of burglary, receiving stolen property, and related crimes. On appeal, the Supreme Judicial Court of Massachusetts reversed the defendant's convictions, holding that the warrant violated the Fourth Amendment because the affidavit supporting the warrant did not satisfy the "two-pronged test" requiring an affiant to reveal an informant's "basis of knowledge" and to provide facts establishing either the general "veracity" of the informant or the specific "reliability" of his report in the particular case, and because there was insufficient corroboration of the informant's tip to make up for the failure to satisfy the two-pronged test.

On certiorari, the United States Supreme Court reversed and remanded. In a per curiam opinion expressing the views of BURGER, Ch. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., it was held that the Fourth Amendment's requirement of probable cause for the issuance of a warrant is to be applied, not according to the rigid "two-pronged test," but rather in the light of the "totality of the circumstances" made known to the issuing magistrate, and that, examined in this light, the police officer's affidavit provided a substantial basis for the magistrate's finding of probable cause for the issuance of the warrant

STEVENS, J. concurred in the judgment, expressing the view that the Supreme Judicial Court of Massachusetts should have first determined whether the warrant was valid as a matter of Massachusetts law before deciding the federal constitutional question.

BRENNAN, and MARSHALL, JJ., dissented from the summary disposition of the case and would have denied the petition for certiorari.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Search and Seizure § 27 — warrant — probable cause — informant's tip

1a, 1b. The "totality of the circumstances," rather than a fixed and rigid formula, is the proper standard for determining probable cause under the Fourth Amendment for the issuance of a search warrant based on information from an informant.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

68 Am Jur 2d, Searches and Seizures § 65

8 Federal Procedure, L Ed, Criminal Procedure §§ 22:126–22:13

7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:497, 20:499

22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 3, 21, 53

33 Am Jur Proof of Facts 2d 549, Criminal Law: Need for Disclosure of Identity of Informant

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence

USCS, Constitution, Fourth Amendment

US L Ed Digest, Search and Seizure § 27

L Ed Index to Annos, Affidavits; Informer; Magistrate; Probable Cause; Search and Seizure

ALR Quick Index, Affidavits; Criminal Law; Informers; Magistrate; Probable Cause; Search and Seizure

Federal Quick Index, Affidavits; Criminal Law; Informers; Magistrates; Probable Cause; Search and Seizure

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ANNOTATION REFERENCES

Federal court determination of probable cause for search warrant: consideration of oral testimony which was, in addition to affidavit, before officer who issued warrant. 24 ALR Fed 107.

Disputation of truth of matters stated in affidavit in support of search warrant—modern cases. 24 ALR4th 1266.

Sufficiency of affidavit for search warrant based on affiant's belief, based in turn on information, investigation, etc., by one whose name is not disclosed. 14 ALR2d 605.

Search and Seizure § 27 — warrant — probable cause — deference to magistrate's decision

2a, 2b. Deference should be granted to a magistrate's decision to issue a search warrant, and a reviewing court should merely decide whether the evidence viewed as a whole provided a "substantial basis" for the magistrate's finding of probable cause as required by the Fourth Amendment, rather than conduct a de novo probable cause determination.

Search and Seizure § 27 — warrant — probable cause — informant's tip

3. A police officer's affidavit describing a conversation with an informant provides a substantial basis for the issuance of a search warrant where, though no single piece of evidence in it is conclusive, the pieces fit neatly together, and, so viewed, support the issuing magistrate's determination that there is a fair probability that contraband or evidence of crime will be found at the location described by the informant.

Search and Seizure § 27 — warrant — probable cause — marginal cases

4. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause for the issuance of a warrant, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded warrants.

OPINION OF THE COURT

Per Curiam.

[1a, 2a] Last Term, in Illinois v Gates, 76 L Ed 2d 527, 103 S Ct 2317 (1983), we held that the Fourth Amendment's requirement of probable cause for the issuance of a warrant is to be applied, not according to a fixed and rigid formula, but rather in the light of the "totality of the circumstances" made known to the magistrate. We also emphasized that the task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant. In this case, the Supreme Judicial Court of Massachusetts, interpreting the probable cause requirement of the Fourth Amendment to the United States Constitution, continued to rely on the approach set forth in cases such as Aguilar v Texas, 378 US 108, 12 L Ed 2d 723, 84 S Ct 1509 (1964), and Spinelli v United States, 393 US 410, 21 L Ed 2d 637, 89 S Ct 584 (1969). Since this approach was rejected in Gates, we grant the petition for certiorari in this case and reverse the judgment of the Supreme Judicial Court.

At noon on September 11, 1980, Lt. Beland of the Yarmouth Police Department assisted in the execution of a search warrant for a motel room reserved by one Richard Kelleher at the Snug Harbor Motel in West Yarmouth. The search produced several items of identification, including credit cards, belonging to two persons whose homes had recently been burglarized. Other items taken in the burglaries, such as jewelry, silver and gold, were not found at the motel.

At 3:20 p. m. on the same day, Lt. Beland received a call from an unidentified female who told him that there was "a motor home full of stolen stuff" parked behind #5 Jefferson Ave., the home of respondent George Upton and his mother. She stated that the stolen items included jewelry, silver and gold. As set out in Lt. Beland's affidavit in support of a search warrant:

> "She further stated that George Upton was going to move the motor home any time now because of the fact that Ricky Kelleher's motel room was raided and that George Upton had purchased these stolen items from Ricky Kelleher. This unidentified female stated that she had seen the stolen items but refused to identify herself because 'he'll kill me,' referring to George Upton. I then told this unidentified female that I knew who she was, giving her the name of Lynn Alberico, who I had met on May 16, 1980, at George Upton's repair shop off Summer St., in Yarmouthport. She was identified to me by George Upton as being his girlfriend, Lynn Alberico. The unidentified female admitted that she was the girl that I had named, stating that she was surprised that I knew who she was. She then told me that she'd broken up with George Upton and wanted to burn him. She also told me that she wouldn't give me her address or phone number but that she would contact me in the future, if need be." See 390 Mass, at 564 n 2.

Following the phone call, Lt. Beland went to Upton's house to verify that a motor home was parked on the property. Then, while other officers watched the premises, Lt. Beland prepared the application for a search warrant, setting out all the information noted above in an accompanying affidavit. He also attached the police reports on the two prior burglaries, along with lists of the stolen property. A magistrate issued the warrant, and a subsequent search of the motor home produced the items described by the caller and other incriminating evidence. The discovered evidence led to Upton's conviction on multiple counts of burglary, receiving stolen property, and related crimes.

On appeal to the Supreme Judicial Court, respondent argued that the search warrant was not supported by a sufficient showing of "probable cause" under the Fourth Amendment. With respect to our Gates opinion, that court said:

> "It is not clear that the Gates opinion has announced a significant change in the appropriate Fourth Amendment treatment of applications for search warrants. Looking at what the Court did on the facts before it, and rejecting an expansive view of certain general statements not essential to the decision, we conclude that the Gates opinion deals principally with what corroboration of an informant's tip, not adequate by itself, will be sufficient to meet probable cause standards." 390 Mass, at 568.

Prior to Gates, the Fourth Amendment was understood by many courts to require strict satisfaction of a "two-pronged test" whenever an affidavit supporting the issuance of a search warrant relies on an informant's tip. It was thought that the affidavit, first, must establish the

"basis of knowledge" of the informant—the particular means by which he came by the information given in his report; and, second, that it must provide facts establishing either the general "veracity" of the informant or the specific "reliability" of his report in the particular case. The Massachusetts court apparently viewed Gates as merely adding a new wrinkle to this two-pronged test: where an informant's veracity and/or basis of knowledge are not sufficiently clear, substantial corroboration of the tip may save an otherwise invalid warrant.

> "We do not view the Gates opinion as decreeing a standardless 'totality of the circumstances' test. The informant's veracity and the basis of his knowledge are still important but, where the tip is adequately corroborated, they are not elements indispensible [sic] to a finding of probable cause. It seems that, in a given case, the corroboration may be so strong as to satisfy probable cause in the absence of any other showing of the informant's 'veracity' and any direct statement of the 'basis of [his] knowledge.'" Ibid.

Turning to the facts of this case, the Massachusetts court reasoned, first, that the basis of the informant's knowledge was not "forcefully apparent" in the affidavit. Id., at 569. Although the caller stated that she had seen the stolen items and that they were in the motor home, she did not specifically state that she saw them in the motor home. Second, the court concluded that "[n]one of the common bases for determining the credibility of an informant or the reliability of her information is present here." Ibid. The caller was not a "tried and true" informant, her statement was not against penal interest, and she was not an "ordinary citizen" providing information as a witness to a crime. "She was an anonymous informant, and her unverified assent to the suggestion that she was Lynn Alberico does not take her out of that category." Id., at 570.

Finally, the court felt that there was insufficient corroboration of the informant's tip to make up for its failure to satisfy the two-pronged test. The facts that tended to corroborate the informant's story were that the motor home was where it was supposed to be, that the caller knew of the motel raid which took place only three hours earlier, and that the caller knew the name of Upton and his girlfriend. But, much as the Supreme Court of Illinois did in the opinion we reviewed in Gates, supra, the Massachusetts court reasoned that each item of corroborative evidence either related to innocent, nonsuspicious conduct or related to an event that took place in public. To sustain the warrant, the court concluded, more substantial corroboration was needed. The court therefore held that the warrant violated the Fourth Amendment to the United States Constitution and reversed respondent's convictions.

[1b] We think that the Supreme Judicial Court of Massachusetts misunderstood our decision in Gates. We did not merely refine or qualify the "two-pronged test." We rejected it as hypertechnical and divorced from "the factual and practical considerations of everday life on which reasonable and prudent men, not legal technicians, act." Brinegar v United States, 338 US 160, 93 L Ed 1879, 69 S Ct 1302 (1949). Our state-

ment on that score was explicit. "[W]e conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in Aguilar and Spinelli. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations." Gates, supra, at 2332, 76 L Ed 2d 527. This "totality of the circumstances" analysis is more in keeping with the "practical, common-sense decision" demanded of the magistrate. Ibid.

We noted in Gates that "the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." Id., at 2330, 76 L Ed 2d 527. This, we think, is the error of the Massachusetts court in this case. The court did not consider Lt. Beland's affidavit in its entirety, giving significance to each relevant piece of information and balancing the relative weights of all the various indicia of reliability (and unreliability) attending the tip. Instead, the court insisted on judging bits and pieces of information in isolation against the artificial standards provided by the two-pronged test.

[2b] The Supreme Judicial Court also erred in failing to grant any deference to the decision of the magistrate to issue a warrant. Instead of merely deciding whether the evidence viewed as a whole provided a "substantial basis" for the magistrate's finding of probable cause, the court conducted a de novo probable cause determination. We rejected just such after-the-fact, de novo scrutiny in Gates. 103 S Ct, at 2331, 76 L Ed 2d 527. "A grudging or negative attitude by reviewing courts toward warrants," United States v Ventresca, 380 US 102, 13 L Ed 2d 684, 85 S Ct 741 (1965), is inconsistent both with the desire to encourage use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case. Gates, supra, at 2331 n 10, 76 L Ed 2d 527.* A deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.

[3] Examined in light of Gates, Lt. Beland's affidavit provides a substantial basis for the issuance of the warrant. No single piece of evidence in it is conclusive. But the pieces fit neatly together and, so viewed, support the magistrate's determination that there was "a fair probability that contraband or evidence of crime" would be found in Upton's motor home. Id., at 2332, 76 L Ed 2d 527. The informant claimed to have seen the stolen goods and gave a description of them which tallied

* "If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.' United States v Chadwick, 433 US 1, 8 [53 L Ed 2d 538, 97 S Ct 2476] (1977)." Gates, supra, at 2331, 76 L Ed 2d 527.

with the items taken in recent burglaries. She knew of the raid on the motel room—which produced evidence connected to those burglaries—and that the room had been reserved by Kelleher. She explained the connection between Kelleher's motel room and the stolen goods in Upton's motor home. And she provided a motive both for her attempt at anonymity—fear of Upton's retaliation—and for furnishing the information—her recent breakup with Upton and her desire "to burn him."

The Massachusetts court dismissed Lt. Beland's identification of the caller as a mere "unconfirmed guess." 390 Mass, at 569 n 6. But "probable cause does not demand the certainty we associate with formal trials." Gates, supra, at 2336, 76 L Ed 2d 527. Lt. Beland noted that the caller "admitted that she was the girl I had named, stating that she was surprised that I knew who she was." It is of course possible that the caller merely adopted Lt. Beland's suggestion as "a convenient cover for her true identity." 390 Mass, at 570. But given the caller's admission, her obvious knowledge of who Alberico was and how she was connected with Upton, and her explanation of her motive in calling, Lt. Beland's inference appears stronger than a mere uninformed and unconfirmed guess. It is enough that the inference was a reasonable one and conformed with the other pieces of evidence making up the total showing of probable cause.

[4] In concluding that there was probable cause for the issuance of this warrant, the magistrate can hardly be accused of approving a mere "hunch" or a bare recital of legal conclusions. The informant's story and the surrounding facts possessed an internal coherence that gave weight to the whole. Accordingly, we conclude that the information contained in Lt. Beland's affidavit provided a sufficient basis for the "practical, common-sense decision" of the magistrate. "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded warrants." United States v Ventresca, 380 US 102, 109, 13 L Ed 2d 684, 85 S Ct 741 (1965).

The judgment of the Supreme Judicial Court of Massachusetts is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice **Stevens,** concurring in the judgment.

In my opinion the judgment of the Supreme Judicial Court of Massachusetts reflects an error of a more fundamental character than the one this Court corrects today. It rested its decision on the Fourth Amendment to the United States Constitution without telling us whether the warrant was valid as a matter of Massachusetts law.[1] It has thereby increased its own burdens as well as

1. Indeed, that court rather pointedly refused to consider whether the search violated the provisions of Art 14 of the Massachusetts Declaration of Rights It stated, in part:

ours. For when the case returns to that court, it must then review the probable cause issue once again and decide whether or not a violation of the state constitutional protection against unreasonable searches and seizures has occurred. If such a violation did take place, much of that court's first opinion and all of this Court's opinion are for naught.[2] If no such violation occurred, the second proceeding in that court could have been avoided by a ruling to that effect when the case was there a year ago.

If the magistrate had violated a state statute when he issued the warrant, surely the state supreme court would have so held and thereby avoided the necessity of deciding a federal constitutional question. I see no reason why it should not have followed the same sequence of analysis when an arguable violation of the state constitution is disclosed by the record. As the Oregon Supreme Court has stated:

> "The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law." Sterling v Cupp, 290 Or 611, 614, 625 P2d 123, 126 (1983).[3]

The maintenance of the proper balance between the respective jurisdictions of state and federal courts is always a difficult task. In recent years I have been concerned by what I have regarded as an encroachment by this Court into territory that should be reserved for state judges. See e. g., Michigan v Long, —— US ——, 77 L Ed 2d 1201, 103 S Ct 3469 (1983) (Stevens, J., dissenting); South Dakota v Neville, 459 US 553, 74 L Ed 2d 748, 103 S Ct 916 (1983) (Stevens, J., dissenting); Minnesota v Clover Leaf Creamery Co., 449 US 456, 477–489, 66 L Ed 2d 659, 101 S Ct 715 (1981) (Stevens, J., dissenting); Idaho Department of Employment v Smith, 434 US 100, 103–105, 54 L Ed 2d 324, 98 S Ct 327 (1977) (Stevens, J., dissenting in part). The maintenance of this balance is, however, a two way street. It is also important that state judges do not unnecessarily invite this Court to undertake review of state court judgments. I believe the Supreme Judicial Court of Massachusetts unwisely and unnecessarily invited just such

"If we have correctly construed the significance of Illinois v Gates, the Fourth Amendment standards for determining probable cause to issue a search warrant have not been made so much less clear and so relaxed as to compel us to try our hand at a definition of standards under art 14. If we have misassessed the consequences of the Gates opinion and in fact the Gates standard proves to be unacceptably shapeless and permissive, this court may have to define the protections guaranteed to the people against unreasonable searches and seizures by art 14, and the consequences of the violation of those protections." App to Pet for Cert 31-32

2. Cf. South Dakota v Opperman, 428 US 364, 49 L Ed 2d 1000, 96 S Ct 3092 (1976) (rev'g 89 SD 25, 228 NW2d 152), on remand, 247 NW2d 673 (1976) (judgment reinstated on state grounds); South Dakota v Neville, 459 US 553, 74 L Ed 2d 748, 103 S Ct 916 (1983) (rev'g 312 NW2d 723), on remand, —— NW2d —— (1984) (judgment reinstated on state grounds).

3. See also State v Kennedy, 295 Or 260, 666 P2d 1316 (1983), and cases cited therein, id., at 262, 666 P2d at 1318; Hewitt v SAIF, 294 Or 33, 41–42, 653 P2d 970, 975 (1982).

review in this case. Its judgment in this regard reflects a misconception of our constitutional heritage and the respective jurisdictions of state and federal courts.

The absence of a Bill of Rights in the Constitution proposed by the Federal Constitutional Convention of 1787 was a major objection to the Convention's proposal. See, e. g., 12 The Papers of Thomas Jefferson 438 (Boyd Ed 1958). In defense of the Convention's plan Alexander Hamilton argued that the enumeration of certain rights was not only unnecessary, given that such rights had not been surrendered by the people in their grant of limited powers to the federal government, but "would even be dangerous" on the ground that enumerating certain rights could provide a "plausible pretense" for the government to claim powers not granted in derogation of the people's rights. Hamilton, The Federalist No. 84, 573, 574 (Ford Ed 1898). The latter argument troubled the 1st Congress during their deliberations on the Bill of Rights, and their solution became the Ninth Amendment. See 1 Annals of Congress 439 (1789) (Remarks of Rep. Madison).

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." To the extent that the Bill of Rights is applicable to the States under the Fourteenth Amendment, the principle embodied in the Ninth Amendment is applicable as well. The Ninth Amendment, it has been said, states but a truism. But that truism goes to the very core of the constitutional relationship between the individual and governmental authority, and indeed, between sovereigns exercising authority over the individual.

In my view, the court below lost sight of this truism, and permitted the enumeration of certain rights in the Fourth Amendment to disparage the rights retained by the people of Massachusetts under Art 14 of the Massachusetts Declaration of Rights. It is of course not my role to state what rights Art 14 confers upon the people of Massachusetts; under our system of federalism, only Massachusetts can do that. The state court refused to perform that function, however, and instead strained to rest its judgment on federal constitutional grounds.

Whatever protections Art 14 does confer are surely disparaged when the Supreme Judicial Court of Massachusetts refuses to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States. The rights conferred by Art 14 may not only exceed the rights conferred by the Fourth Amendment as construed by this Court in Gates, but indeed may exceed the rights conferred by the Fourth Amendment as construed by the state court. The dissent followed the approach of the majority to its logical conclusion, stating that there "appears to be no logical basis, and no support in the case law, for interpreting the term 'cause' in Art 14 differently from the 'probable cause' requirement of the Fourth Amendment." Pet for Cert 9a. "The right question," however, "is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn

out the same as it would under federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised." Linde, E Pluribus—Constitutional Theory and State Courts, 18 Ga L Rev 165, 179 (1984).

It must be remembered that for the first century of this nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State constitutions protected the liberties of the people of the several States from abuse by state authorities. The Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States in our federal system, however, remain the primary guardian of the liberty of the people. The Massachusetts court, I believe, ignored this fundamental premise of our constitutional system of government. In doing so, it made an ill-advised entry into the federal domain.

Accordingly, I concur in the Court's judgment.

Justice Brennan and Justice Marshall dissent from the summary disposition of this case and would deny the petition for certiorari.