1970

State of Utah v. Robert Joseph Smelser : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

ROBERT JOSEPH SMELSER,
Defendant-Appellant.

Case No. ~~4747~~ 11766

APPELLANT'S BRIEF

Appeal from Judgment of Fourth Judicial District Court for Utah County
Honorable ALLEN B. SORENSEN, Judge

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STATEMENT OF THE KIND OF CASE

Appellant was charged with grand larceny occurring in Utah County, Utah, January 27, 1969.

DISPOSITION IN LOWER COURT

The matter was tried by jury before the Honorable Allen B. Sorensen, Judge of the Fourth Judicial District, on May 12, 1969. The case was submitted to the

jury, which returned a verdict of guilty of the crime of grand larceny. The court denied defendant's Motion for New Trial and sentenced the defendant to the Utah State Prison for the indeterminate term provided by law.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the conviction and the judgment thereon and for an order dismissing the case or granting him a new trial.

STATEMENT OF FACTS

On January 27, 1969, the Gene Evans Pharmacy, Provo, Utah, was burglarized, with watches, cash and others items being taken. Their value is in excess of $50.00.

Twenty-three days later, on February 19, 1969, N. W. Hayward, a Salt Lake County Deputy Sheriff, applied in the Salt Lake County District Court for a warrant authorizing him to search the home of defendant at 1082 South 6th West, Salt Lake City, Utah, for the property stolen in the pharmacy burglary. The warrant issued, search made, property seized from the defendant's home, and returned to the issuing magistrate, Stewart Hanson. (R 32A, 32B). Two days later the defendant was charged in this case in Utah County. (R 4).

At the preliminary hearing the search warrant and its fruits were not used. Defendant was bound over to trial on the testimony of Gene Evans, owner of the pharmacy, that there had been a burglary and larceny, and the testimony of Max Weenig that he had been in the Utah County Jail while the defendant was awaiting bond, and that the defendant had told him he had committed the subject crime. (R 3).

Before trial of the case, defendant made a Motion to Suppress Evidence. (R 10-16, 28-30). This Motion was denied without consideration of its merits because the search warrant and affidavit, not having been placed in evidence at the preliminary hearing, and the State being unwilling to concede at the Motion to Suppress Evidence Hearing that it intended to use them, the court had no warrant nor affidavit before it to rule upon. (Tr. P6, L17-30).

At the trial, before the opening statements, defense counsel asked the district attorney if he would use the subject search warrant and affidavit and the fruits of the search. The district attorney said yes, and then introduced Officer Hayward's affidavit and Judge Hanson's warrant. Defense counsel consented to this for the purpose of identifying the documents preparatory to a Motion to Suppress. The Motion was then made and denied by the court. During these proceedings the jury was not present. (Tr. P4, L2-P16, L9).

Gene Evans testified for the prosecution that he was owner o fthe Evans Pharmacy in Utah County,

that it had been burglarized on January 27, 1969, that certain items including paper money stapled together, silver coins in money wrappers and Timex watches had been taken. He identified Exhibit 3, a money wrapper, as possibly having come from his store. (Tr. P18, L25-Tr. P22, L2). He identified 10 twenty-dollar bills, which had perforations that might be staple marks, as being similar to bills he had had in the pharmacy that were taken in the burglary. He also identified mass-produced Timex watches, Exhibit 6, as being the same kind taken from him in the burglary. (Tr. P26, L3-Tr. P27, L27).

Evelyn Morgan Austill was called by the prosecution and testified that she had been a clerk at the pharmacy at the time of the burglary. She identified the coin wrappers as bearing her handwriting and the money and watches as being similar to those carried at the pharmacy. (Tr. P34, L5-P35, L5; Tr. 32, L2-9).

Officer Hayward testified for the prosecution. He said that he was a Salt Lake County Deputy Sheriff, that he obtained a search warrant, based on his affidavit, from the Third District Court, that he searched the defendant's home on February 19, 1969, in Salt Lake County, Utah, and that the items identified previously by Mr. Evans and Mrs. Austill were items he had found in his search of defendant's home. (Hayward Tr. P11, L24-P17, L10). Officer Hayward testified that he asked the defendant if he had anything to say about the items at his home and that the defendant replied that he had nothing to say. (Hayward Tr.

P19, L3-21). Officer Hayward further testified that to his knowledge, defendant, defendant's wife and their children all resided together at that same home. (Hayward Tr. P20, L9-11).

The search warrant issued based on the statement in Officer Hayward's deposition and affidavit in support of the application for warrant that an informant had made a buy of property identified as being stolen from the Evans Pharmacy from the defendant, and that this buy had been made at the request of Dave Reynolds, of the State Department of Business Regulation. (R 32A, second sheet). On cross examination Officer Hayward admitted that he didn't know whether the informant had made the purchase before or after the informant had talked to Mr. Reynolds. (Hayward Tr. P7, L28-P8, L6). He also testified that he hadn't seen the item himself and didn't personally know how it connected to the burglary, although Mr. Reynolds had advised him that there was a connection. (Hayward Tr. P9, L12-16; P9, L22-P10, L8).

At the conclusion of Officer Hayward's testimony, defense counsel moved the court suppress the evidence obtained pursuant to the search warrant because Officer Hayward's testimony showed a new, and vital, defect in the affidavit. If the "buy" was not made under law officer direction and control, then the circumstances under which the "buy" was made, or the reliability of the informant, became crucial to the existence of probable cause. This motion was denied and the case continued. (Hayward Tr. P10, L15-P11, L13).

Max Weenig testified for the prosecution. He had been an inmate of the Utah County Jail during the few days that defendant was there between his arrest and his posting bail. He testified that defendant told him several times in detail how he had committed the subject burglary and larceny. (Tr. P37, L10-P39, L24).

On cross examination Mr. Weenig admitted that he was serving a one-year term in the Utah County Jail as a result of a felony probation violation (Weenig Tr. P2, L15-P5, L2) and testified that he was giving information not as a result of promises or threats on the part of any law enforcement officer. He testified that he himself volunteered to "pump" the defendant without being asked to do so. (Weenig Tr. P12, L14-28). When defense counsel sought to examine him as to an ulterior motive for falsifying the court flatly disallowed the line of questioning. (Weenig Tr. P22, L2-19).

The defendant did not take the stand and called no witnesses in his behalf.

The prosecution introduced no physical evidence such as fingerprints, clothing or eyewitnesses to connect the defendant to the crime. The State's case rests entirely on possession 24 days later plus admissions to a fellow jail mate.

POINT I

THE COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO ALLOW EXAMINATION OF MAX WEENIG AS TO HIS MOTIVES FOR TESTIFYING.

No issue of police force or promises was involved because Mr. Weenig volunteered to to "pump" the defendant. (Weenig Tr. P12, L14-28). The issue was not external, such as threats or promises, but internal, his hope of gain.

Mr. Weenig was not an ordinary, uneducated criminal; he was a former businessman. In fact, he had run his own business in the same building where the Evans Pharmacy was located and knew the premises intimately. (Weenig Tr. P14, L12-P15, L1). Mr. Weenig was serving a one-year Utah County Jail sentence for probation violation starting in December 1968, and with 10 months still to go, when Mr. Smelser was also at the jail. (Weenig Tr. P2, L16-P3, L25).

Mr. Weenig knew the premises of the Evans Pharmacy. The story of the means and route of the burglary had been in the Provo newspapers and, of course, talked about within the jail. It is entirely possible that his testimony was based on this knowledge, without defendant ever having talked to Mr. Weenig about the matter. He did err, for example, on an important point that might have been only within the knowledge of the actual burglar: Mr. Weenig testified that the

defendant told him the bulk of the loot was in $20.00 bills and the total cash taken was $7,800.00, not $5,-700.00, as alleged in the complaint. (Weenig Tr. P5, L10-18). In fact, the bulk of the loot was forty $100.00 bills and the total was $5,700.00. (Tr. 21, L25-28).

Why did Mr. Weenig volunteer to "pump" the defendant? From defense counsel's experience, he has been advised that "squealers" are not entirely safe among their fellow inmates. It is also possible that a "squealer" might gain favor by being an informant on his fellow inmates. Mr. Weenig might have hoped to save 10 months in jail by giving information against the defendant. If that were the case, whether he actually got information from the defendant, or only said that he had in a plausible fashion, either way he could have a genuine hope of gain. The court flatly refused to allow examination of Mr. Weenig on this point:

"Q Now you say you saw the Deputy Sheriff, Mack Holley, and said you thought you could pump information out of Smelser on this burglary, right?

A Yes, sir.

Q Have you been in the habit of reporting to the authorities on what prisoners tell you?

MR. GAMMON: Objection.

THE COURT: Sustained.

Q. (By Mr. King) You had a reason for doing —for talking to Mack Holley, didn't you?

MR. GAMMON: Objection.

THE COURT: Sustained.

Q (By Mr. King) Did you hope to gain something by telling the authorities—

MR. GAMMON: Objection.

THE COURT: Sustained. You are arguing to the jury now, Mr. King. This isn't the time yet for that. There will be a time for that, but not now, with this witness."

(Weenig Tr. P22, L2-19).

The court misconstrued the thrust of the questions. Because there was no claim that the witness was acting under coercion or promises, the court apparently felt that concluded inquiry into his motives for testifying. However, there was another equally pertinent area going directly to the credibility of the witness, as stated in Jones on Evidence, 5th Edition, Vol. 4, Sec. 916, P. 1717, "The rule is well settled that, on cross examination, questions which tend to impeach the impartiality of the witness, while not directly relevant to the issue on trial, are relevant in the sense that the persuasive quality is affected by the discrediting testimony." Jones continues on to draw the line of judicial discretion not as to the right to cross examine as to motive, but only as to the extent of the cross-examination, "Frequently, it has been held to be error not to permit cross-examination as to the state of feelings or bias of the witness. But a question as to the extent of such cross-exami-

nation is to be resolved in view of the discretion of the court." (ibid P. 1722). The flat error of the trial court was in refusing to allow *any* cross-examination as to self-interest on the part of the witness. Mr. Weenig was not a cumulative witness. There was no connection between the defendant and the crime of larceny as opposed to possible possession, other than the testimony of Mr. Weenig, so he was a vital witness.

78-24-1 UCA 1953, provides "*who may be witnesses —jury to judge credibility.* . . . Neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; . . . although, in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, *or by his motives,* or by contradictory evidence; and the jury are the exclusive judges of this credibility."

"The interest of a witness in any particular case in which he becomes a witness *may always be shown,* and the effect, if any, of such interest upon the weight of the testimony, is always a question for the jury. *State v. Cerar,* 60 U 208, 220, 207 P. 597.

The error of the court in not allowing cross-examination as to motive was prejudicial error, because the credibility of the witness was crucial, and a proper examination into his motives might well have effected the outcome of the case. *State v. Neal,* 1 U 2d 122, 262 P. 2d 756, 759; *State v. Cluff,* 48 U 102, 158 P. 701; *Jensen v. Utah Ry. Co.,* 72 U 366, 270 P. 349.

POINT 2

THE COURT'S INSTRUCTION NUMBER 7 CONSTITUTED A COMMENT ON THE EVIDENCE, CONSTITUTING PREJUDICIAL ERROR BY STATING " . . . HAVING REASONABLE OPPORTUNITY TO SHOW THAT HIS POSSESSION WAS HONESTLY ACQUIRED, HE REFUES OR FAILS TO DO SO, SUCH CONDUCT IS A CIRCUMSTANCE THAT TENDS TO SHOW HIS GUILT."

"76-38-1. Definition.—Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another. *Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt.*"

Instruction no. 7. "The mere possession of stolen property, howsoever soon after the taking, unexplained by the person having possession is not sufficient to justify conviction. It is, however, a circumstance to be considered in connection with other evidence in determining the question of innocence or guilt. If you should find from the evidence that the property involved in this case was stolen, and that thereafter the defendant was found in possession or claimed to be the owner of the stolen property, *such a fact would be a circumstance tending in some degree to show guilt,* although not sufficient, standing alone and unsupported by other evidence, to warrant finding him guilty. In addition to

proof of possession of such property there must be proof of corroborating circumstances tending, of themselves, to establish guilt. Such corroborating circumstances may consist of the acts, conduct, falsehood, if any, or other declaration, if any, of the defendant or any other proved circumstance tending to show the guilt of the accused.

One who is found in the possession of stolen property *is bound to explain such possession in order to remove the effect of that fact as a circumstance,* to be considered with all other evidence, *pointing to his guilt,* and if he gives a false account of how he acquired that possession or, *having reasonable opportunity to show that his possession was honestly acquired, he refuses or fails to do so, such conduct is a circumstance that tends to show his guilt."* (Emphasis added) (R. 22).

The purpose of the underlined section of the statute is to allow the court to determine as a matter of law if the state has made a prima facie case. If the state has, the case goes to the jury. If the state has not, the case does not go to the jury. However, an instruction, thrice repeated, constituting a comment on the evidence by the court, that unexplained recent possession "is a circumstance that tends to show his guilt," goes beyond statutory authority. It is error to instruct the jury on the question of what constitutes a prima facie case.

State v. Crowder, 114 U 202, 197 P. 2d 917. "This statute is addressed only to the court, it determines for the court what evidence is sufficient to constitute

a prima facie case, and it is the duty of the court when a prima facie case has been made to submit it to the jury, but it does not require the court to instruct the jury that such facts constitute a prima facie case. The jury is not concerned with that problem, they are only concerned with whether all of the evidence is sufficiently convincing of defendant's guilt. This court has repeatedly held that it is error to instruct the jury on that question."

Here the court's instruction states unequivocally "such a fact to be a circumstance tending in some degree to show guilt," "such conduct is a circumstance that tends to show his guilt," and, the defendant "is bound to explain such possession in order to remove the effect of that fact as a circumstance, to be considered with all other evidence, pointing to his guilt." These are comments on the evidence. These do carry to the jury the prima facie case that is reserved to the court as a matter of law. The only other evidence, other than possession, connecting the defendant to the crime was not eyewitness, nor physical, such as fingerprints, but only the highly questionable testimony of Max Weenig. In State v. Crowder, supra, while the court affirmed the conviction, it went on to say "were the evidence of guilt susceptible to considerable doubt, it is not at all certain that the giving of such an instruction would not be prejudical."

As another issue within this point, recent case holdings have made it clear that a defendant is not required

to give evidence against himself at any stage of any criminal proceeding, either before or after his arrest. Miranda v. Arizona, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694. The statute in question states that a person who "fails to make a satisfactory explanation shall be deemed prima facie." The statute does not say that no explanation is an unsatisfactory explanation. In this case, the defendant made no explanation. (Hayward Tr. P19, L5-21). To hold that no explanation is an unsatisfactory explanation is to require self-incrimination. If a defendant voluntarily gives a statement, and the statement is false, the statute would apply. No Utah case deals specifically with a "no explanation" case under the present statute. State v. Hart, 10 U 204, 37 P. 331, was a decision before the present statute was enacted. Nevertheless, it bears on point, holding that the state needs (1) recent possession and (2) an unsatisfactory explanation. State v. Hart, has been cited with approval in Utah cases since enactment of the statute in its present form, such as State v. Nichols, 106 U 104, 145 P.2d 802. In this case we have four factors: First, the defendant shared possession of his home with his wife and children. Second, he was found in possession twenty-four days later. Third, he gave no false or inconsistent explanation as required by Hart, supra. Fourth, there was no other corroborating evidence except Weenig.

It was error for the court to instruct the jury three times as to the inference of guilt. Whether the error was prejudicial, from the Utah rulings seems to depend

on the circumstances of the case. With the existing circumstances and factors, such error is prejudicial in nature, because without such an instruction, the jury might have well reached a different verdict, and this is a basic test of prejudicial error. State v. Cluff, supra; Jensen v. Utah Ry. Co., supra.

POINT 3

THE EVIDENCE OBTAINED IN THE SEARCH OF DEFENDANT'S HOME SHOULD HAVE BEEN SUPPRESSED BECAUSE THE AFFIDAVIT ON WHICH THE SEARCH WARRANT WAS ISSUED WAS INADEQUATE TO STATE PROBABLE CAUSE.

Evidence obtained in a search should be suppressed if the search warrant issued upon an affidavit inadequate to state probable cause. State v. Jasso, 21 U 2d 24, 439 P.2d 844.

It is conceded at the outset that the affidavit need not be finely technical, it can incorporate reliable heresay and observations of others than the affiant, but it must state fact. No case sets this forth better than a 1939 Utah case, Allen v. Lindbeck, 97 U 471, 93 P.2d 920. In that case, the court was called upon to decide squarely a definition of probable cause because it was faced with a statute under which a search warrant issued, but the requirements of the statute were slightly less than the requirements of the Utah Constitution.

(95-2-10 Utah Laws 1933, as opposed to Article I, Sec. 14, Utah Constitution). The court stated, 97 Utah at 481, "The whole case upon which a search warrant issues must be made by him who prays for such writ. The judicial officer before whom an application for a search warrant is filed must exercise his judicial power to determine whether or not the warrant shall issue; such judicial function can be moved only by the facts brought before him, which are under oath or affirmation. A warrant to search and seize, which follows upon a statement based solely upon the belief of the affiant, rests upon the reasoning of the affiant, based upon the secret facts of which he may have knowledge, and the conclusions which result from such reasoning are affiant's not those of the judical officer. The judicial process to ascertain probable cause is then transferred from the judicial officer to the affiant. The Constitution permits no such thing."

Applying the rule that the affidavit must state facts and migistrate draw the conclusions, the affidavit in the case now before the court states "your affiant is now and has been for the past 15 years assigned to the Detective Detail thereof.

"On the date of February 19, 1969, at approximately 9:00 a.m., your affiant (received information from) Dave Reynolds, who received the information from a confidential informant that items on the attached list are in the possession of Robert Smelser at the aforementioned address. Dave Reyonlds, Dept .of Business

Regulation, through the confidential informant did make a buy from Smelser and has identified the same as coming from a burglary of Gene Evans Pharmacy at Provo, Utah." (R 32A, sheet 2, list of property at R 32A sheet 4).

The particular defects of the affidavit are that it alleges that defendant has certain property in his possession with a list attached to the affidavit describing the property. However, the affidavit in no way states that the property on the list is stolen property, nor describes the "item" purchased, nor relates it to the list of property. It simply states that defendant has possession to wit: "Dave Reynolds, who received the information from a confidential informant that items on the attached list are in the possession of Robert Smelser at the aforementioned address."

Based on the foregoing, any conclusion that the property in the possession of the defendant is in any way related to stolen property is entirely the conclusion of the affiant based on facts which he does not relate in the affidavit.

The affidavit further complicates matters by alleging that the defendant sold stolen property. It in no way identifies what the property was, nor how it was identified as being connected with the burglary of the Gene Evans Pharmacy. These facts again are left to the knowledge of the affiant, and are not submitted to the court, to wit: "Dave Reynolds, Department of Business Regulations, through the confidential informant

did make buy from Smelser and has identified the same as coming from a burglary of Gene Evans Pharmacy, at Provo, Utah."

The affidavit leaves these questions unanswered: (1) If the defendant has possession of the property itemized on the list, what facts are there in the affidavit to connect the property to a burglary? (2) If Dave Reynolds caused something to be bought from the defendant, what was bought? (3) If Dave Reynolds caused something to be bought from the defendant, what proof is there that it was stolen other than his conclusion?

Reliability of the informant is not of importance based on the face of this affidavit because it says the informant acted under police control and direction, even though the affiant officer relied on information given him by another officer. A similar case is U.S. v. Ventresca, 380 US 102, 85 S Ct 741, 13 L Ed 2d 684. There, a search warrant issued for a search of a premises where illegal distilling was suspected based on a factually detailed affidavit of an officer that he and other officers had observed the premises, had seen sugar bags going in, five gallon cans coming out, smelled mash and heard sounds of machinery. The case held that hearsay is acceptable, even though not technically evidentiary if it incorporated the reports of other officers. It applied the test of reliability of information, not evidentiary perfection. It stated "a recital of some of the underlying circumstances is essential if the magis-

trate is to perform a detached function and not serve merely as a rubber stamp for the police." Applying the Ventresca rationale, however, the questions of identity of the items is utterly unrevealed in the affidavit. This is crucial to a search warrant issued, as this one, under 77-54-2 (1) UCA 1953, on possession of stolen property. The property itself is crucial, yet the facts by which the property is identified are unknown.

POINT 4

THE EVIDENCE OBTAINED PURSUANT TO THE SEARCH WARRANT SHOULD HAVE BEEN SUPPRESSED BECAUSE THE WARRANT ITSELF WAS ISSUED WITHOUT PROBABLE CAUSE, BECAUSE THE AFFIANT DIDN'T KNOW AT ALL WHETHER HIS AFFIDAVIT WAS TRUE OR FALSE ON A VITAL POINT.

The point here is the accuracy of the affidavit, not its face value. The facts are: In his affidavit for issuance of the search warrant (R 32A, sheet 2) Deputy Hayward swore that an informant acting under law officer direction and control bought stolen property from defendant, as follows: "Dave Reynolds, Department of Business Regulation, through the confidential informant did make a buy from Smelser . . . " At no stage of this case has the informant, nor Dave Reynolds, made any appearance. The State chose to support

the facts alleged in the affidavit solely on the basis of Officer Hayward's testimony at the trial.

At the trial, Officer Hayward was called as a witness by the state to identify the property in evidence as property he seized at defendant's home pursant to the warrant. (Hayward Tr. P4, L17-27). At that point, the trial proceedings were interrupted by defense counsel, who was allowed to voir dire the witness in regard to the warrant. This would not be timely under ordinary procedures, but was necessary in this case because the affidavit, warrant, and return on warrant were all in Salt Lake County, (R. 32A, 32B). Defendant's Motion to Suppress Evidence made prior to the trial had been denied because the State refused to admit it would use the subject warrant and evidence obtained thereby, so that the trial court had nothing to act upon, (Hayward Tr. P6, L1-16). The trial court allowed the mid-trial examination and Motion to Suppress on this basis. (Hayward Tr. P6, L1-16).

Officer Hayward then testified on voir dire,

"Q Did Officer Reynolds tell you he, himself, had made the purchase?

A He said the informant had made the purchase for him.

Q Was that at his request?

A I would imagine it was sir, I don't know.

THE COURT: You don't know?

A No, sir.

Q (By Mr. King) Do you know whether or not the informant made the purchase before Officer Reynolds asked him to do so?

A I don't understand the question.

Q Did the informant make the purchase before or after he talked to Officer Reynolds?

A I don't know that.

Q You don't know?

A No, sir.

Q. Was it the informant who identified the item as being part of the property stolen from the Evans Pharmacy?

A Mr. Reynolds was the one that identified it through the list of stolen items he had been furnished by Provo City. That was my understanding on it, Mr. King."

(Hayward Tr. P7, L20—P8, L11).

"Q Did you ever see the item that the informant obtained?

A No, sir. That is still in the possession of Officer Reynolds.

Q So you don't know of your own knowledge how it connected to the Evans burglary?

A No, sir."

(Hayward Tr. P9, L12-18).

The effect of this testimony is that Officer Hayward's affidavit stating that "Dave Reynolds did make a buy through the confidential informant," is false. Officer Hayward didn't know if this is what happened or if the informant made the purported buy on his own and then reported it after the purported act was done. No statement of fact can actually be supported beyond the hypothetical following affidavit which is all that Officer Hayward could really have sworn to, "An informant, unknown to me, alleged to another officer that he bought an item from the defendant which was stolen from the Evans Pharmacy. I don't know what the item is, nor how it connected to the burglary, but I am told by Officer Reynolds that it corresponds to the property named on the list of property stolen from the pharmacy. I don't know who prepared the list, or whether the list is accurate, or whether the subject item is unique and identifiable, or a mass-produced item not traceable specifically to the pharmacy. However, on the report of this unknown informant, the defendant may have possession of the stolen property and I would like to make a search."

This would have been an honest affidavit. It is submitted, as argument, that if an officer could obtain a warrant without probable cause by distortion of what he knows, and the warrant stand up and the evidence go in, then the constitutional guarantees of sanctity of the home would be nullified and officers encouraged to falsify.

There are actually two separate issues that must be considered. First, because the warrant actually rests simply on the report of an informant, is his credibility adequately established? Second, once the search warrant has been issued by a magistrate, is the affidavit itself subject to factual attack?

As to the first issue, the case is clear. Returning to Allen V. Lindbeck, supra, probable cause means that the magistrate must have enough facts at his disposal to make an intelligent determination that a search warrant is proper. How can such a warrant issue when the source of the information is unknown and uncorroborated? The affidavit of Officer Hayward doesn't even refer to the information as "reliable" or "credible", but only as "confidential." (R 32A, sheet 2). There is a plenitude of cases dealing with the credibility of the informant, when this is the key to whether cause is probable. Spinelli v. U.S., 21 L Ed 2d 637, dealing with a fact situation where the affidavit was based part on observations of police and part, but crucially, on reliability of informant, sets forth a two-part test that (1) the affidavit must set forth sufficient underlying circumstances necessary for the magistrate to make an independent judgment, and (2) must give factual detail on why an informant is reliable and more than the allegation that the informant is reliable or credible is necessary. Such would be only a conclusion. Supporting cases are U.S. v. Ventresca, supra; Rugendorf v. U.S., 376 US 528, 11 L Ed 2d 887, 84 S Ct 825; Draper v. U.S., 358 US 307, 3 L Ed 2d 327, 79

S Ct 329; Aquilar v. Texas, 378 US 108, 12 L Ed 2d 723, 84 S Ct 1509.

As to the second point, once the affidavit has issued is it subject to attack as to its accuracy? Regendorf v. U.S., supra, states "The court has never passed directly on the extent to which a court may permit such examination when a search warrant is valid on its face and when the allegations of the underlying affidavit establish probable cause." The court then goes on to allow the attack, although denying the claim, because the factual inaccuracies of the affidavit weren't material.

Following the Regendorf decision, several cases have touched on the point. The most detailed discussion is contained in U.S. v. Halsey, 257 FS 1004, SDNY, 1966. The problem is administrative—creating a trial within a trial and opening the way for delaying tactics. The court held, 257 FS 1005, "viewing the problem in the broad sense of defendant's submission, we reject the contention. This is not to say that there may never be occasions for trying out the truth of an affidavit on which a search warrant issues. It is only to say that there is no justification for allowing such a de novo trial of the issuing magistrate's determination as a routine stipulation in every case. Until or unless the defendant has at least made some initial showing of some potential infirmity he proposes to demonstrate, the magistrate's acceptance of the affidavit as truthful should be enough." U.S. v. Halsey has been affirmed in U.S. v. Bowling, 351 F 2d 241; U.S. v. Suarez, 380

F 2d 715 ("It may be that testimony at trial could so clearly demolish a statement in an affidavit supporting a warrant, that a prior denial of a motion to suppress would be overruled."); U.S. v. Gillette, 383 F 2d 843, 848 ("We by no means forestall the possibility that, in the appropriate circumstances, a hearing should be held to establish the veracity of sworn allegations in an affidavit which is sufficient on its face.")

Defendant accepts the rationale of these cases. Attack on the accuracy of an affidavit for search warrant can create major problems. However, for the courts to turn their back when it is known that the affidavit is false is to deny the necessary for truth in sworn affidavits to magistrates.

In this case, Officer Hayward swore a "buy" had been made under police control, when he had no knowledge at all that this was the fact. Police observations, and action taken under police control, usually are prima facie probable cause. However, the acts of unknown informants do not constitute probable cause. For them there must be support; here there was no support. Defendant's procedure could have been no more timely than it was. The evidence should be suppressed.

Respectfully submitted,

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