



# POLICE / PROSECUTOR UPDATE

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A recent Court of Appeals case highlights the importance of including facts, and not an affiant's conclusions, in an affidavit for a search warrant (or arrest warrant). The affidavit in question read, so far as is relevant here: "During the past 52 hours the Affiant met with a confidential and reliable informant regarding the above location (the residence to be searched). Under controlled circumstances and under the direction of the Affiant, this informant visited the residence. During that visit the informant purchased a quantity of white rock-like substance which was reported by (defendant) to be crack cocaine. The informant has purchased crack cocaine in the past and is familiar with the appearance and packaging of crack cocaine. The informant has personal knowledge that (the defendant) does keep crack cocaine inside the house.

"Prior to obtaining this information, the Police Department has received numerous complaints from concerned citizens regarding the possibility of illegal drug trafficking at the location. Many of these complaints indicate that there was a frequent flow of traffic to and from this residence whereby the visitors would only remain at the residence for a very brief period of time before leaving. The Police Department has conducted surveillance of this residence in the past and confirmed that there was an unusual flow of traffic which is indicative of drug trafficking."

The Court of Appeals held this affidavit was wholly inadequate. First, the trustworthiness of hearsay for purposes of establishing probable cause can be proved in a number of ways, including where: (1) the informant has given correct information in the past; (2) independent police investigation corroborates the informant's statements; (3) some basis for the informant's knowledge is shown; or (4) the informant predicts conduct or activities by the suspect that are not easily predicted. In this case, the affidavit contained no information to establish the CI's reliability. There are no *facts* to support a finding that the CI had given correct information to police in the past or to establish the reliability of the CI's hearsay that the defendant "does keep crack cocaine inside the house." Nor did the CI predict conduct or activities by the defendant that would have corroborated her hearsay statement. A judicial officer who issues the warrant cannot rely on the affiant's representation that an informant is "reliable" without an *independent factual basis* to support that representation. The affiant's judgment cannot be substituted for that of the neutral judicial officer.

Nor do the complaints of "concerned citizens" save the affidavit. Under the law, if an unquestionably honest citizen comes forward with a report of criminal activity - *which if*

*fabricated would subject him to criminal liability* - courts do not subject the basis of his knowledge to close scrutiny. However, like an anonymous informant who has no incentive to be truthful because there is no possibility of criminal liability for filing a false report, the anonymity in this case of the "concerned citizens" shields them from scrutiny for any possible ulterior motives. Standing alone, complaints from *unknown* citizens provide no information to assess the credibility of their hearsay statements. The State argued that police surveillance of the residence constituted independent police investigation that corroborated both the CI's and the citizens' hearsay. It did not. The affidavit did not disclose what constitutes an "unusual" flow of traffic, when "in the past" the surveillance was conducted, or why that activity would indicate drug trafficking. Such vague assertions do not corroborate the reliability of hearsay information.

Finally, the "controlled buy" was inadequate to provide probable cause. Under the law, "a controlled buy consists of searching the person who is to act as the buyer, removing all personal effects, giving him money with which to make the purchase, and then sending him into the residence in question. Upon his return he is again searched for contraband. *Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police. They ascertain that the buyer goes directly to the residence and returns directly, and they closely watch all entrances to the residence throughout the transaction.*" Here, the only evidence that a controlled buy occurred was the affiant's conclusory statement that the buy was conducted "under controlled circumstances and under the direction of the Affiant." This is not a statement of fact but a conclusion. The affidavit presented virtually no factual basis that a controlled buy had occurred. It did not indicate that the CI was searched prior to the transaction, removing all personal effects. There was no indication that the CI was searched again upon her return. The affiant did not state that he personally observed the CI enter the defendant's residence and return directly nor did he state that the police closely watched all entrances to the residence throughout the transaction. In short the affiant's failure to set forth any *facts* to establish that controls were adequate rendered the affidavit alleging a controlled buy insufficient to establish probable cause.

Methene v. State, 720 N.E.2d 384 (Ind. Ct. App. 1999).

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