



# POLICE / PROSECUTOR UPDATE

Issue No. 85

December 1998

The Court of Appeals recently decided a case regarding search warrants. It illustrates the importance of being accurate and candid when preparing an affidavit for a search warrant. The facts reveal that a State Police Sergeant received information that a cocaine delivery was to occur that night in the parking lot of a specified grocery store. The Sergeant, along with other state policemen, conducted surveillance of the lot. A vehicle was observed entering the lot and parking. The officers approached the vehicle and asked the driver to exit. A pat-down search of the driver resulted in the discovery of cocaine. He was informed that it would be in his best interest to consent to a search of the vehicle, which he did. To avoid having the vehicle damaged during the search, the driver told the Sergeant that there were drugs in the console. Additional cocaine and some marijuana were found there.

Although initially reluctant, the driver eventually named his source (the defendant) and agreed to act as an informant. He stated that on the following day, he was to deliver \$3,000 to the defendant for the cocaine discovered in his vehicle. He also described the defendant's residence and gave directions to reach it and told the officers he had seen firearms there in the past. Based on this information, the police decided to get a search warrant and conduct a "controlled delivery" of the \$3,000. The informant would be wearing a wire, and the warrant would be executed when the money changed hands. This plan was carried out, resulting in the discovery of large amounts of drugs, cash, and firearms. The affidavit for the search warrant was made by a State Trooper based on information supplied by the informant and reported by the Sergeant.

The affidavit for search warrant was clearly based on hearsay. The trooper seeking the warrant was reporting what the informant had allegedly told the Sergeant. The credibility of the hearsay informant is to be determined by examining the totality of the circumstances.

The U.S. Supreme Court has held that uncorroborated hearsay from a source whose credibility is itself unknown, standing alone, cannot

support a finding of probable cause to issue a search warrant. The reliability of hearsay can be established 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 demonstrated; or (4) the informant predicts conduct or activities by the suspect that are not ordinarily easily predicted. The credibility of the informant's statements was not established here. None of the statements made by the informant to police was against penal interest, which would tend to support credibility. The fact that the informant described the defendant's residence and location was irrelevant. Anyone who knew where the defendant lived could have reported those facts to the police.

However, of more importance was that information contained in the affidavit was misleading. One paragraph implied that the Sergeant had used the informant in the past when in fact he had not. The informant was a stranger. This was critical in that it was the only representation in the affidavit that went directly to the informant's credibility. To quote the court: ". . .it is imperative that judicial officers have complete information when deciding whether there is probable cause to issue a search warrant. This is particularly true when the decision is based upon hearsay and the totality of the circumstances. 'Totality of the circumstances' means just that, not information that has been selected with the goal of making the judicial finding of probable cause more likely. Nor does 'totality of the circumstances' allow the omission of relevant information that could affect an independent judicial determination.

"Here, law enforcement authorities recovered a motherlode of contraband from the defendant's residence. Unfortunately, the evidence was seized pursuant to an unlawful warrant and is inadmissible. That is the price we must pay to assure that millions of law abiding Indiana residents remain secure from unreasonable searches and seizures."

Newby v. State, \_\_\_ N.E.2d \_\_\_ (Ind. App. 10/30/98).

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