

ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

Alaska State Trooper John Smith, assigned to the drug unit, was working with a confidential informant, Dana. They had set up several controlled purchases of cocaine, including one involving a woman named Liz. Trooper Smith prepared an affidavit in support of a search warrant to search Liz's house for cocaine, cocaine paraphernalia and the buy money.

The following information was included in Trooper Smith's affidavit to the magistrate:

1. Trooper John Smith, assigned to the drug unit, was working with a confidential informant, Dana; Dana was a former drug addict working with the state as an informant in exchange for a charge of cocaine possession being dropped.
2. Trooper Smith and Dana successfully set up several prior controlled purchases of cocaine before the incident involving Liz; these incidents had all resulted in criminal convictions.
3. Trooper Smith received a tip that cocaine was being sold out of a house rented by two women, Liz and Maggie, and was told by Dana that she knew Liz and could probably set up a buy.
4. Trooper Smith allowed Dana to contact Liz on her own at the house; Dana reported back that she had arranged for a cocaine purchase to take place at the house.
5. Trooper Smith and Dana then obtained a search warrant that allowed Trooper Smith to monitor Dana's activities at the anticipated drug deal through electronic surveillance (a "wire").
6. Trooper Smith followed standard procedure to set up a controlled purchase of drugs: a female officer searched Dana to confirm that she did not have any drugs on her; Dana was outfitted with the "wire"; Dana traveled with Trooper Smith in his car to the house; Trooper Smith parked so that he could observe Dana going to and from the front of the house; and Dana was given pre-marked bills to use in the sale.
7. The plan required Dana to enter the house, conduct the sale inside, and then immediately return to Trooper Smith's car.
8. Trooper Smith brought Dana to Liz's house. She left the car, and Trooper Smith watched as she approached the house. He saw her knock on the door and enter the house. He was also listening through the wire.
9. Trooper Smith saw that a woman answered the door and could hear through the wire that Dana said "Hi, Liz."

10. Dana then returned to Trooper Smith's car and turned over a paper slip containing cocaine to him, telling him that she had purchased it from Liz with the buy money.

Trooper Smith did not include in his affidavit that the transmission from the wire had stopped just after Dana had entered the house. He had asked Dana about it, but she had no explanation for why it had quit working. She was very familiar with wires from prior controlled buys. Trooper Smith examined the wire, but could find nothing wrong with it. Trooper Smith did not think it was important to include this information in the affidavit, given that he never represented in the affidavit that he had been able to hear the sale being conducted.

Trooper Smith also did not include in his affidavit that Dana had deviated from the planned procedure. Dana did not emerge out the front door, as planned; instead she appeared from around the rear of the house and returned to the car. Trooper Smith had been concerned about this deviation and asked Dana why she did not come out the front door. Dana said that Liz had wanted the sale to take place away from Maggie, who Liz had said was upstairs, and made Dana go out into the back yard where the sale took place. Trooper Smith did not consider this deviation significant once he heard Dana's explanation.

The magistrate issued a search warrant based on Trooper Smith's affidavit. The pre-marked money was found in a cookie jar in the kitchen of the house. No other evidence of cocaine was found in the house.

Based on finding the pre-marked money in Liz's house and on Dana's statement that it was Liz who had sold Dana the cocaine, Liz was charged with misconduct involving a controlled substance for the delivery of cocaine to Dana.

Liz is preparing a motion to suppress the buy money seized pursuant to the search warrant, arguing that the search warrant was invalid. She wants to argue that Trooper Smith's affidavit (1) should not have been able to include the information from the confidential informant and failed to establish probable cause, or (2) should have described everything about the controlled buy at Liz's house and was invalid for not doing so.

1. Discuss the legal grounds that Liz can present to support these arguments and whether the arguments will be successful. (Assume that the earlier search warrant allowing electronic surveillance was properly issued.)

GRADER'S GUIDE

*** QUESTION NO. 5 ***

SUBJECT: CRIMINAL LAW

1. Using the information from the confidential informant in the affidavit and failing to establish probable cause (50 points)

A magistrate may issue a search warrant only after being presented with information that provides a substantial basis from which the magistrate can conclude that there is probable cause to believe that a crime had been committed and that evidence of that crime can be found in the location identified. *State v. Jones*, 706 P.2d 317, 321 (Alaska 1985). Here Trooper Smith's affidavit was based in significant part on the hearsay statements of his confidential informant Dana. Particularly, Trooper Smith had no firsthand knowledge of the actual crime, the delivery of cocaine. His affidavit relied on what Dana told him and presented the information from Dana to establish probable cause that a crime had been committed, that Liz had delivered cocaine to Dana.

Liz can try to argue that the search warrant could not rely on hearsay, but search warrants may be based on hearsay to establish probable cause so long as the hearsay has the indicia of reliability. *State v. Jones*, 706 P.2d 317, 321 (Alaska 1985). When hearsay is included in an affidavit, Alaska requires that courts apply the *Aguilar-Spinelli* test, see *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), rather than the federal totality of the circumstances test required by *Illinois v. Gates*, 462 U.S. 213 (1983). See *Jones*, 706 P.2d at 324-25. This test requires that an affidavit in support of a search warrant application establish both (1) the hearsay declarant's basis of knowledge and (2) the hearsay declarant's credibility or the reliability of the information. *Id.* at 320.

As to what was included in the affidavit, it does not appear that Liz has a challenge under the *Aguilar-Spinelli* test either that the trooper could not rely on a confidential informant's statements or that the affidavit failed to establish probable cause.

The hearsay statements were based on the confidential informant's personal knowledge that the crime had been committed. Thus, there is no argument that the affidavit failed the basis of knowledge prong of the test. This information also established probable cause that a crime had been committed. Dana's information was that a delivery of cocaine had taken place. Liz's argument

would then turn to the hearsay declarant's credibility or the reliability of the information.

Hearsay information can come from a cooperative citizen, a non-criminal informant, or an informant who is a member of the "criminal milieu." *Erickson v. State*, 507 P.2d 508, 517-18 (Alaska App. 1973). Because the confidential informant here, Dana, came from the "criminal milieu," i.e., because Dana received favorable treatment from the police, her hearsay statements are subject to mistrust unless the affidavit establishes past reliability or independent corroboration of several of the informant's facts (or by an admission against penal interest which is not an issue here). *Ivanoff v. State*, 9 P.3d 294, 297-98 (Alaska App. 2000). Under the *Aguilar-Spinelli* test, the issuing magistrate must be provided with sufficient information to allow the magistrate to independently determine that the informant's source of information is reliable and that the informant is credible in communicating the information to the authorities. *Lewis v. State*, 862 P.2d 181, 185 (Alaska App. 1993).

Trooper Smith's affidavit disclosed that the confidential informant had come from the "criminal milieu" and disclosed the deal that she had made with the state. See *Landon v. State*, 941 P.2d 186 (Alaska App. 1997) Because of this, the trooper therefore also included information that the informant had been reliable in the past in providing similar information (by the fact that criminal convictions had resulted from earlier controlled purchases). The trooper also included information that corroborated the information provided by the informant about the actual purchase of cocaine. The affidavit included information about the pre-buy procedures and about what the officer had observed or heard through his surveillance that corroborated Dana's statements.

Thus, on the face of the affidavit, Liz would have no successful challenge to the search warrant either based on the fact that the officer relied on hearsay statements from Dana because she was a confidential informant or that the affidavit failed to establish probable cause. On its face, the information in the affidavit satisfies the *Aguilar-Spinelli* test.

2. Being required to describe everything about the controlled buy because the officer was using a confidential informant (50 points)

Trooper Smith's statements in the affidavit suggested to the magistrate that all the pre-buy procedures had been followed and that nothing unusual had happened. But this is not the case. The surveillance was not complete in that the wire failed to work and in that there was a deviation from the planned activity by Dana when she appeared from the rear of the house and did not

come out the front door. Liz can argue that failing to include this information in Trooper Smith's affidavit renders the search warrant invalid.

Where the state either misrepresents or withholds information from the issuing magistrate, a warrant can be invalidated either if the information misrepresented or withheld was material to the issuance of the warrant and was either recklessly or intentionally withheld/misrepresented, or, even if not material to the issuance of the warrant, if it was intentionally withheld/misrepresented. *Williams v. State*, 737 P.2d 360 (Alaska App. 1987); *State v. Malkin*, 722 P.2d 943 (Alaska 1986); see also *Franks v. Delaware*, 438 U.S. 154 (1978)(but Court did not include holding that an intentional misrepresentation would invalidate the search warrant where the misrepresentation was not material to the probable cause finding).

Here Trooper Smith provided information concerning the controls placed on the informant, Dana. But Trooper Smith did not provide all the information as to how the delivery had occurred. Particularly, he did not indicate that he had not been able to hear what had occurred inside the house, even though the informant had been wired for the purpose of his being able to do so, or that the informant had deviated from the plan and had actually left the house through the rear where there was no surveillance.

Liz can successfully argue that the omitted information would have been material to the magistrate's decision to issue the search warrant. The reliability prong required the magistrate to consider the officer's corroboration of the informant's claims. It was possible that Dana could have either obtained the cocaine from someone else in the house or could have planted it in the yard behind the house earlier and picked it up herself to make a case against Liz (in order to insure that her own criminal charge was not reinstated). Trooper Smith had no means of confirming Dana's version of events once she got inside the house. If the magistrate had been told that the surveillance of the confidential informant, Dana, was flawed and the precise manner in which it had failed, the magistrate may have questioned the reliability of the hearsay statements from Dana and may not have issued the warrant. Especially since Trooper Smith himself was concerned about the deviation in the planned surveillance, the magistrate could have decided not to issue the search warrant if aware of the lack of surveillance on Dana.

Thus, the question becomes whether the information was intentionally or recklessly withheld. Under Alaska law, it is the state that has the burden of showing that the omission did not occur either intentionally or recklessly. *Malkin*, 722 P.2d at 946 n. 6 (differing from federal law where the defendant bears the burden of establishing both that a material omission occurred and the mental state of the officer, see *Franks v. Delaware*, 438 U.S. 154 (1978)).

There is no indication that Trooper Smith intentionally withheld the information to insure that he would obtain the search warrant. The state would likely be able to show that the omission did not occur intentionally. But the issue of Trooper Smith's recklessness in withholding the information is a good one for Liz to argue.

Trooper Smith chose to include the information about what kind of pre-buy surveillance had been put into place. Including this information reasonably led the magistrate to conclude, unless getting information to the contrary in the affidavit, that the surveillance was carried out as planned. In particular, by stating that there was electronic surveillance and mentioning that he had heard the informant greet Liz over the electronic surveillance, Trooper Smith created the impression that the surveillance was ongoing. Similarly, the manner in which the trooper described Dana's actions failed to alert the magistrate to Dana's deviation from the plan and presence in the backyard of the house with no surveillance.

Thus, the situation looks like one where Trooper Smith recklessly withheld information. If the state cannot establish that the officer was not reckless, then the search warrant is invalid. A person is reckless with respect to an omission if the person was aware of the risk that the magistrate would have been misled by the manner in which the person included some but not all of the available information in his affidavit but went ahead and prepared the affidavit in that manner anyway. *See Davis v. State*, 766 P.2d 41 (Alaska App. 1988). Liz can likely argue successfully that the state cannot show that Trooper Smith was not reckless with respect to his omissions, particularly where he had concerns about the information that he chose not to include.

Thus, Liz has a strong argument that the omitted information was both material and recklessly omitted, supporting her argument that the items seized pursuant to the warrant, the buy money, should be suppressed.

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Benchmark

1

Alaska Bar Examination

**FEB
2005**

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Question **No. 5** *Only*

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1). Assuming that the earlier search warrant allowing electronic surveillance was properly issued, Liz should attack the Trooper's affidavit based on the reliability of the police informant.

The Alaska courts will apply the Branough factors to police informant-based affidavits for warrants.

Since the Alaska Courts have not adopted the less stringent federal Gibson test for reliability of police informants, Liz may be successful in casting doubt on the credibility of the prosecution's evidence by de-basing the actual basis for the issuance of the search warrant based on the reliability/credibility of the police informant - Dana Liz should point out that Dana doesn't meet

the preponderance of the factors established by the court in Branough to establish credibility or reliability. Specifically Dana's information for which the information for the second warrant was obtained is suspect based on:

- 1) Dana's status as an offender of the states drug statutes who is cooperating with police to plea-down to a lesser drug charge,
- 2) Dana's history with the police is short and low criminal convictions resulted from the cooperation
- 3) Dana's deviance from the "Buys" structured plan.
- 4) The gap period which the informant cannot account for while in the house does not lend

itself to cause that Liz provided or sold any drugs to informant.

5) Lack of reliability in identification of the "Buys" main suspect by police observers.

Liz's grounds may not prove successful, however. Since the affidavit specifically elucidates the Police/Trooper's procedure for setting up "Buys" using the former drug addict which then resulted in successful convictions; the number of such buys may be enough to persuade the court of the informant's reliability.

The court may also choose to review the exclusion of evidence of the entirety of the "Buy" in order to allow prosecution to

present the evidence at trial and allow defense to overcome the evidence obtained by introducing the home's second occupant that is not being prosecuted. There is no imputation by the Search Warrant that Liz alone is a drug dealer and the question of the co-renter's involvement remains open.

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Alaska Bar Examination

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crim. procedure

1) Liz will argue that the search warrant affidavit is required to have probable cause on its face for the search warrant to issue. Liz will argue that Dana is biased because she is a former drug addict working in exchange for her charges being dropped. The court would probably not deem

the argument to persuade them as confidential informants are routinely used in search warrants. The S.W. would likely be upheld.

~~at~~
Additionally, Liz would argue that there was no evidence, proof, or speculation that Liz ~~was~~ could be involved in a drug sale. As sentence 3 points out, drugs were suspected being sold in the house, and both Liz and Maggie live there.

A search warrant must be supported by
probable cause, and a S.W. lacking probable cause
should not be issued. Evidence obtained from a
S.W. lacking in probable cause should be suppressed by
the court.

Liz would have more success with the
argument that the S.W. ^(affidavit) should have contained the description
of everything about the controller body and was involved
for not doing so.

Since the "wire" was tested and worked before
and after the alleged drug sale, there is no explanation
for why it was not working while Dora was
inside the house. Trougher Smith should have
put that information in the affidavit, and by

omitting it, he left out information that could have caused the Magistrate to deny the warrant.

More importantly, the affidavit lacks any and all details of the alleged drug transaction with Liz.

There are no details about how much drugs or money was transacted. There is not enough probable

cause to show Liz was involved or that she sold drugs.

In addition, Dana deviated from the plan and did not exit thru the front door. Dana admits being "behind the house" and "in the back yard" so it's possible someone outside the house ~~brought~~^{gave her} drugs.

Upon the search of the house - no drugs were found. No drug paraphernalia was found. No items used in ~~the~~ drug sales was found like

baggies or scales.

Liz can argue that all of the details of the drug transaction (whatever allegedly happened inside the house) should have been put on the affidavit and since none of it was, the documents lacked probable cause. Without probable cause the magistrate should never have issued the Search Warrant.

As Maggie was listed as living at the house, she could have been the person involved in the alleged drug transaction.

Liz would argue that under the fruit of the poisonous tree doctrine, since there was no probable cause for the S.W. the evidence of the drugs and the money found in the cookie jar should be suppressed.

Search Warrants (and their underlying Affidavits)

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are not required to be perfect and explain everything, so it is unlikely Liz's legal arguments will prevail.

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Lisa will likely argue that Davis was not a reliable informant, so it was improper to find probable cause for a warrant based on her statements. Under Aguirre-Espinelli, a magistrate may find probable cause to issue a search warrant if he finds there is adequate ^{veracity} ~~reliability~~, and basis of knowledge. ~~The~~ ~~magistrate~~ magistrate is to weigh these factors in light of the totality of the circumstances. In assessing veracity, a magistrate should pay ^{particular} ~~particular~~ attention to ~~past~~ past reliability, independent corroboration by police, and whether ~~of~~ the information is against informer's interests. Here, Troger stated that Davis had been reliable in the past, and Troger had received an independent tip ~~from~~. As to ~~basis of knowledge~~, Davis may not have been ~~a person~~ ~~of~~, however, Davis's statements were in her interest

as she was getting charges dropped for aishis police. As to basis of knowledge, Dan probably did not have sufficient basis at first, but the search warrant was based on her ~~experience~~ ^{experience} in the house, which is sufficient personal experience.

As to her second argument, Dix may argue that ~~the~~ trooper was not entirely forthright and ~~honest~~ ^{honest} in his affidavit, or the ~~search~~ ^{sensory} search warrant is invalid. Police must be honest in their affidavits for a warrant, including not making misleading statements or half-truths. Here, Dix can argue that there were some serious problems with the controlled buy that was the basis for ~~a~~ probable cause, ~~with~~ which the trooper conveniently left out. First, the wine going out was highly irregular, suggesting the possibility that

Dave tampered with it, and significantly reducing the ~~some~~ evidence of what transpired. Second, Dave ~~exited~~ ^{exited} from the back of the house, casting doubt over what occurred. The trooper should have at least ~~mentioned~~ ^{mentioned} this in an affidavit, because it either might have been enough to defeat probable cause.

Trooper Lir's argument is likely to fail because Trooper has a good argument that these problems were minor. While a type of ~~to~~ what happened inside would be nice, Dave is a reliable informant whose word is sufficient to find probable cause for a warrant when she has personal knowledge. As to exiting out the back, trooper may argue that Jews often do not eye down precisely as planned, and a small ~~disturbance~~ ^{deviation} does not defeat probable cause, especially when the informant

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turns up with hard evidence like cocaine.

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The Constitution of Alaska and the US prohibits unreasonable searches and seizures. Where a person has a reasonable expectation of privacy, the police must have a validly executed warrant supported by probable cause. A valid warrant must be based on sufficient probable cause, issued by a neutral & detached magistrate and precise on its face as to the place searched & items seized.

~~It has~~ It has long been acceptable that the police can rely on an informant when making an affidavit in support of an application for a search warrant.

The police can rely on the tip from an informant provided the tip/information meets the following 2 prong test (set out in Agular - Spennelli): ① the informant's information must be based on the informant's personal knowledge + ② the informant's veracity + reliability must be established.

The informant's reliability can be established by former dealings (eg used the informant successfully before). Where the informant is a paid informant, or is receiving some benefit/plea bargain (as Dana was receiving here), the police must also show some evidence which corroborates the informant's information.

Then the magistrate must independently determine whether the evidence, submitted in the affidavit supports probable cause, that the police are likely to find evidence of crime at the place to be searched.

Where an affidavit omits material facts which may, if they were included, have led the magistrate to a different decision on probable cause, those facts must be inserted in the affidavit. ^{after} ~~the~~ considering the affidavit with those statements included, the court must then decide if the warrant can still stand. This can only happen where law enforcement negligently omitted the statement.

where law enforcement officers intentionally omit relevant information; with an intent to mislead the magistrate the warrant will not stand.

Here, Liz's best argument is to argue that Trooper Smith intentionally omitted the statements and thus the warrant is invalid, and the evidence should be suppressed by the exclusionary rule as the fruit of an illegal search.

alt., Liz will argue that these omissions, had they been included would not have shown probable cause to search.

① Not include Dana's information:

Liz will argue that Dana could not

be considered reliable or truthful & ~~because~~ ^{that} the police did not include any evidence corroborating Dana's tip. Dana had motive to cooperate with police (for her ~~charges~~ ^{charges} being dropped). Her information was not necessarily reliable. The police should gathered / found additional evidence to corroborate before relying on her tip. They did not, thus her info should be regarded as unreliable.

Secondly, the house was occupied by Jay & Maggie. The officer nor the informant offered evidence to show why Jay was the suspect. The

guilty party could have been Maggie. Thus, the tip provided no probable cause (P.C.), + was not enough for a finding of PC.

2. Failing to Describe the Controlled Buy:

By failing to include all the details of the buy, again there is insufficient facts to support probable cause to search, and arrest Liz. The facts do not give any indication of whether Liz participated in the buy (she only said "Hello Liz" when the door was opened) or that the buy happened in the house. All the details of the buy

had been disclosed, it is likely that the magistrate would have denied the warrant for lack of probable cause.

There is a strong case for suppressing the money seized.

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1) ~~The~~ Confidential Informant

Alaska uses the 2-prong Aguilar-Spinelli test when hearsay is used to form probable cause for a warrant. The first prong is the Basis of the Knowledge. ~~The~~ The informant must have personal knowledge, not just rumors. The second prong is the credibility ~~or~~ veracity of the witness. The court will look at 3 factors to determine credibility.

1) reliability of the ~~with~~ informant

in the past; 2) corroboration of the information that the informant provided; 3) whether the statement was made against informant's interest.

When the informant is a citizen,
1. The corroboration is necessary.

However, when the informant is a police informant, significant corroboration is necessary.

Here, the first prong is probably met. ^{Dana} ~~Liz~~ said to the Trooper that she knew Liz and could probably set up a buy. Dana then set up the buy.

The court will consider the factors to determine whether Dana met the second prong & was credible.

1) Dana had ~~not~~ been involved in several prior controlled purchases of cocaine that resulted in convictions. This indicates her past conduct was credible.

2) Because Dana was a police informant, significant corroboration of the info she provides is necessary. The Trooper monitored Dana's activities with a wire. Trooper parked out

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front so he could observe Dana go inside. The Trooper was the one who originally received the tip, it was not provided by Dana. ~~the~~ Trooper verified that Liz answered the door. The Trooper could have corroborated more by doing extra surveillance on the house to see the number of people going in & out, ~~whether~~ there was ~~an~~ However, the corroboration was probably sufficient.

3) The informant here was doing this for her own

interest - to get out of a cocaine charge.

Considering the totality of the circumstances, ^{but especially the corroborative} the court will likely find that the Aguilar-Spinelli test was met.

2) Trooper should have described everything to magistrate.

The Trooper has a duty to present information to the Magistrate so that the Magistrate can determine whether there was probable cause to issue the warrant. Here there was probable cause without the

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extra info that the Trooper did not provide.

However, Alaska law holds that a Trooper can't intentionally withhold information from the magistrate that is relevant to

the determination of probable cause. The facts at issue here are whether Trooper intentionally did not inform the magistrate that the wife quit working when Lisa Davis went inside, or that Davis deviated from planned procedure by not coming out the front door.

The facts do not ~~seem~~ seem to indicate that the Trooper was intentionally concealing info from the Magistrate. Also, the Magistrate could have questioned the Trooper as to why he didn't include any statements by Liz or Dawn inside the house. If the Magistrate thought they ~~were~~ were necessary facts to determine probable cause.

The warrant was likely valid because the Trooper did not intentionally misrepresent the facts to the Magistrate and ~~the~~ probable cause for the warrant existed w/out those facts.