



Cite as: 2010 (4) AELE Mo. L. J. 101

ISSN 1935-0007

Civil Liability Law Section – April 2010

**Civil Liability and
Affidavits for Search Warrants**

Contents Part One (this issue)

- Introduction
- Mistaken Identity
- False or Deceptive Allegations
- Inadequate Corroboration
- Ordinary Mistakes
- References

Contents Part Two (May issue)

- Informant Discrepancies
- Probable Cause Nonetheless Revealed
- Material Omissions
- Objective Reasonableness
- Resources

Introduction

The carrying out of searches, including searches pursuant to judicially issued search warrants, is a vital component of law enforcement activity.

A previous article in this publication addressed the topic of “[Civil Liability for Exceeding the Scope of a Search Warrant](#),” based on situations when officers, arguably armed with a validly issued search warrant, exceed the permissible scope of the authorized search, searching places and seizing things beyond what the warrant contemplated, without the justification of one of the exceptions to the [Fourth](#)

[Amendment's](#) warrant requirement, such as consent, plain view, or exigent circumstances.

It also discussed cases where the fault found was with the stated scope of the warrant itself, search warrants that amount to “general” warrants authorizing “fishing expeditions” into anything and everything, instead of particularly describing, with specificity, “the place to be searched, and the persons or things to be seized.”

The focus of this two-part article is a little earlier in the process—the drafting and presenting of affidavits to a court for the purpose of having a search warrant issued. When can an officer be held liable for allegedly presenting an affidavit that improperly causes a court to issue a search warrant that should not have been issued?

Once a search warrant has been issued by a court, to what extent can officers rely on the court’s action in doing so to immunize them from civil liability for carrying out the search that the warrant directs?

Those are the questions this article briefly examines. At the conclusion of this article, there is a listing of useful resources and references on the subject of search warrants.

Mistaken Identity

Officers may be held civilly liable for their role in drafting and presenting affidavits to a court for the purposes of obtaining search warrants if they knowingly make false statements or misrepresentations, if they make statement essential to the finding of probable cause in reckless disregard of the truth, and in some circumstances, for omitting known exculpatory information that would have negated the finding of probable cause.

.An example of these principles is [Walker v. City of Wilmington](#), #08-4218, 2010 U.S. App. Lexis 853 (Unpub. 3rd Cir.). In this case, a married couple and their two children sued a city and one of its detectives for unlawful search. The detective, while searching for suspects in a stabbing, received information from a confidential informant in which the names of a suspect and his mother were similar to the husband and wife’s names. He used this information to obtain a search warrant for the plaintiffs’ residence.

The search was carried out by a SWAT team and a K-9 unit, who entered the home with drawn weapons. All four residents were “rounded up,” but the officers then realized that they were in the wrong house. A federal appeals court found that there was sufficient evidence from which a jury could find that the search warrant was not supported by probable cause and that the detective had made representations about the location of the suspect that were either knowingly false or made with reckless disregard of the truth.

False or Deceptive Allegations

In [Baldwin v. Placer County](#), #04-15848, 405 F.3d 778 (9th Cir. 2005) an officer assigned to a sheriff department’s marijuana eradication team (MET) obtained a search warrant for the home of a dentist and his wife on the basis of information that the dentist was possibly growing marijuana. The homeowners sued, claiming that deception was used in obtaining the warrant, and that an officer’s statement concerning evidence that marijuana was being grown on the premises found in their trash was fabricated.

The appeals court found that if the alleged lies were removed from the affidavit for the search warrant, there would be nothing left to justify a search. What was left, the court stated, “is an unidentified citizen at an unidentified date telling a sheriff’s deputy of marijuana growing at an unidentified time; also the presence of a rock and two pots, the uses of which are ambiguous. No magistrate could have authorized a search on this basis, essentially amounting to an informant's tentative tip.”

“The Fourth Amendment,” the court reasoned, “is the guarantee of every citizen that his home will be his castle, safe from the arbitrary intrusion of official authority. It is no barrier at all if it can be evaded by a policeman concocting a story that he feeds a magistrate.” And the lies allegedly stated in the affidavit were found to have clearly motivated the magistrate to issue the warrant, so that qualified immunity to civil liability was properly denied.

Another case illustrating this is [Hervey v. Estes](#), #94-35445, 65 F.3d 784 (9th Cir. 1995), ruling that an officer who made false statements in an affidavit for a search warrant was not entitled to qualified immunity from liability when the affidavit, absent false statements, would not have provided probable cause for issuance of a warrant.

Affidavits for search warrants need not be perfect, on the other hand, and do not have to constitute “proof” that a crime was committed or an iron-clad guarantee that evidence

of it will be found at the scene of the search. The purpose of the search is investigation, to hopefully find evidence not yet in law enforcement's possession. And mistaken statements that do not negate other facts establishing probable cause cannot give rise to civil liability.

In [Ewing v. City of Stockton](#), #08-15732, 588 F.3d 1218 (9th Cir. 2009), for instance, the court found that while an affidavit for a search warrant had two possibly deceptive misrepresentations, they were not "critical" for a finding of probable cause. An identification of the wife in the home in connection with a murder was sufficiently reliable and established probable cause. Additionally, there was no requirement that the affidavit establish probable cause to arrest her for the murder.

It was sufficient that it established probable cause for the search. Anonymous tips received, which claimed that someone else had committed the murder, were insufficient to eliminate probable cause. The alleged misrepresentations included a mistaken statement that the wife had recently been arrested for domestic violence, which was unconnected with the crime under investigation.

Similarly, see [Suarez v. Town of Ogden Dunes](#), #08-2544, 581 F.3d 591 (7th Cir. 2009), upholding summary judgment for police officers in a lawsuit over their search of a home pursuant to a search warrant, and the arrest of the occupants for contributing to a minor's delinquency.

The plaintiffs failed to show that any of the statements in the affidavit for the search warrant concerning underage drinking constituted intentional or reckless misrepresentations or omissions, and there was probable cause for the warrant.

Probable cause exists, the court stated, when "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that . . . evidence of a crime will be found," and this is based on "beliefs, not certainties."

Inadequate Corroboration

In contrast, in [Kohler v. Engle](#), #05-30541, 470 F.3d 1104 (5th Cir. 2006), the court ruled that the affidavit for a warrant for the seizure of a suspect's DNA in an investigation seeking a serial killer and rapist was not supported by probable cause.

Anonymous tips that were not corroborated were insufficient to provide probable cause, as were a 20-year-old burglary conviction and the fact that the suspect was unemployed.

Other information allegedly relied on by the detective who submitted the affidavit to the judge, such as an FBI profile of the man sought, was irrelevant, since it was not provided to the judge.

Ordinary Mistakes

Mere mistakes cannot be a basis for liability, without evidence of greater culpability. In Andreen v. Lanier, Civil Action #08-cv-0810, 582 F. Supp. 2d 48 (D.D.C. 2008), the court ruled that when an apartment resident claimed that a search warrant obtained for her home was negligently requested by an officer based on factual inconsistencies and unreliable information, she failed to show a constitutional violation, which requires intentional or reckless disregard for the truth rather than negligence or an innocent mistake.

The plaintiff did not show that the affidavit for the warrant contained false material information.

References (chronological):

- Wayne R. LaFave, [Search and Seizure: A Treatise on the Fourth Amendment](#), 4th Edition, 2 vols. (West, 2004-2009)
- Michael Longyear, “[To Attach or Not to Attach: The Continued Confusion Regarding Search Warrants and the Incorporation of Supporting Documents](#),” 76 Fordham Law Review No. 1 (2007).
- Bryan R. Lemons, “[Civil Liability for False Affidavits](#),” Police Chief (Nov.2004).

Prior Relevant Monthly Law Journal Articles

- Monthly Law Journal Article: [Civil Liability for Exceeding the Scope of a Search Warrant](#), 2010 (1) AELE Mo. L. J. 101.

AELE Monthly Law Journal

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