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Civil Liability and Affidavits for Search Warrants

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Informant Discrepancies

The existence of probable cause in an affidavit for a search warrant can be found 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. These beliefs need not be absolute, or subject to no doubt. In Molina Ex Rel. Molina v. Cooper, #02-1995, 325 F.3d 963 (7th Cir. 2003), the court stated that an officer was not required to express his concern to a judge issuing a search warrant for the search of a home in a drug activity investigation when there was no evidence that any doubts he had about the informant's information were serious.

A failure to acknowledge, in an affidavit for the warrant, that the informant had given different numbers regarding the amount of cocaine he allegedly distributed for the suspect did not eliminate probable cause for the warrant.

Informants whose information is relied on in many affidavits for search warrants, of course, may be less than ideal citizens, and may themselves be involved in various criminal or at least not reputable endeavors, or possibly have a variety of motives to take action detrimental to the interests of the suspects at whom the search warrant is directed.

In Hale v. Kart, #03-1793, 398 F.3d 721 (6th Cir. 2005), the court ruled that an officer who swore out an affidavit for a search warrant for an apartment was entitled to qualified immunity when a woman's statements that she had observed illegal prescription drug sales there were included. The mere fact that she was intoxicated, and had been involved in a domestic dispute with the resident did not alter the result.

The affidavit, the court found, was sufficient on its face that an officer could rely on it for a finding of probable cause. It described the probable existence of large quantities of prescription medication and cash in a specific location in the apartment, and the basis for the officer's belief, the disclosure by a witness who claimed to have been present during drug sales, as well as explaining the woman's presence in the apartment and her relationship to the resident.

The woman was not an anonymous or paid informant, and her identity was disclosed, and the affidavit included her admission that she had herself been given Vicodin by the resident.

The affidavit also included the fact that the officer was the lead investigator in a recent break-in and theft of large quantities of Vicodin and other prescription drugs from a local drug store.

All of these specific facts presented "ample evidence of probable cause" that drugs and their proceeds would be found in the apartment. "The affidavit (and thus the warrant), on its face, and looking at the totality of the circumstances, contains sufficient indicia of probable cause to allow an officer or a judge to reasonably rely on it."

Probable Cause Nonetheless Revealed

Even arguably intentionally false statements in an affidavit, if striking them would still leave sufficient information constituting probable cause, may not lead to civil liability.

In Cotton v. Sassak, #2:06-cv-15208, 2009 U.S. Dist. Lexis 25480 (E.D. Mich.), for instance, a federal trial court found that a homeowner and her son made a "substantial" showing that an officer lied in his affidavit seeking a search warrant for their home by saying that he found mail addressed to the residence in garbage bags. The son swore that he and his mother shredded any documents that showed their address.

However, the affidavit for the search warrant, even lacking the statements about the mail, still showed probable case, based on the officer's statement concerning an anonymous tip of drug activity in the home, and his subsequent investigation, which observed heavy foot traffic there and found marijuana residue in the garbage bags. The officer, therefore, was given qualified immunity on claims related to the validity of the warrant.

Similarly, in Haire v. Thomas, #06-12428, 2006 U.S. App. Lexis 27608 (Unpub. 11th Cir.), the court found that even if the 8 paragraphs that a homeowner challenged in an 11-page, 38-paragraph affidavit for a search warrant for his residence were false, the remainder of the affidavit was adequate to supply probable cause for the issuance of the search warrant.

Accordingly, the homeowner's Fourth Amendment rights were not violated and the FBI agent who filed the affidavit to obtain the warrant was entitled to qualified immunity.

Material Omissions

Material omissions from affidavits for search warrants, as well as false statements, may be a basis for civil liability. In Floyd v. City of Kenner, #08-30637, 2009 U.S. App. Lexis 23913 (5th Cir.), a police officer claimed that an illegal search of his residence was carried out and he was falsely arrested for purported theft of supplies. The officer sufficiently alleged that a detective, in applying for search and arrest warrants, both made false statements and omitted material information from the affidavits.

The “intentional or reckless omission of material facts from a warrant application may amount to a Fourth Amendment violation.” Further discovery was ordered to determine if a police officer who entered the plaintiff’s property and reported seeing allegedly stolen supplies was entitled to qualified immunity, because of conflicting versions as to his purposes for entering.

Nothing more than “speculation,” however, supported the claim that the police department's chief of investigations approved the filing of false affidavits, and there was also insufficient detail to support a claim that the police chief was personally involved in directing the filing of the affidavits. Claims against the city were properly dismissed in the absence of a showing that anyone acted pursuant to a municipal policy or custom.

Neither supervisory nor municipal liability for an officer’s alleged violations of constitutional rights in connection with an affidavit for a search warrant may be based on vicarious liability. Rather it requires some kind of personal participation on the part of the supervisor or official policy or custom on the part of the municipality.

See also, Cruz-Acevedo v. Toledo-Davila, #07-1844, 660 F. Supp. 2d 205 (D.P.R. 2009), in which a homeowner claimed that police officers entered his home armed with a search warrant issued because of an officer’s false statements, that two of the officers knew that the statements were false when they participated in the search, and that officers used excessive force while doing so.

Dismissing federal civil rights claims against supervisory police officials, a federal court found that, even if the facts of the search were as stated, there was no evidence from which the supervisory officials could be held liable.

There was evidence, for instance, that a police superintendent undertook “numerous” actions to investigate and remedy police conduct he had become aware of, and that the police commander took steps to make sure all officers received civil rights training.

In Morris v. Lanpher, #08-2040, 563 F.3d 399 (8th Cir. 2009), the court found that an officer acted in an objectively reasonable manner in seeking to obtain a search warrant for a home following a shooting. He heard the shooting victims identify two assailants and gathered evidence identifying them and linking them to a residence and to the victim’s roommate.

Additionally, both the victim and his roommate identified one of the residents of the home from a photo array as a participant in the crime. General allegations that the officer, in his warrant application, engaged in the deliberate hiding of material and exculpatory information did not suffice to show that the warrant was lacking in probable cause.

There was no indication that the officer had any personal stake in the case or that he acted in any way other than as an impartial investigator. There was also no evidence that the warrant affidavit included deliberate falsehoods, or that the officer engaged in reckless disregard of the truth.

Objective Reasonableness

What about the possible civil liability of officers who carry out the search authorized on the face of the warrant when there are alleged defects in the affidavit? Can the officers rely on the fact that a judge issued the warrant to immunize them against civil liability, or on advice from others, such as prosecutors, that the warrant and its affidavit are sufficient, regardless of whether or not they were involved in drafting and presenting the affidavit?

An officer conducting a search is entitled to qualified immunity if a reasonable officer could have believed that the search was lawful in light of clearly established law and the information the searching officers possessed. See Anderson v. Creighton, #85-1520, 483 U. S. 635, 641 (1987).

This is the same objective reasonableness standard applied under the "good faith" exception to the exclusionary rule. The central question is whether someone in the officer's position could reasonably but mistakenly conclude that his conduct complied with the Fourth Amendment.

In Mills v. City of Barbourville, #02-6404, 389 F.3d 568 (6th Cir. 2004), the court found that a search warrant issued on the basis of an affidavit that did not establish a link between criminal activity and the residence to be searched or even that the address was the residence of the suspect was so lacking in probable cause as to make reliance on it objectively unreasonable.

Also of interest for its discussion of justifiable reliance is KRL v. Estate of Moore, #06-16282, 512 F.3d 1184 (9th Cir. 2008). In this case, during a criminal investigation concerning the removal and disposal of an underground gasoline storage tank, a search warrant was obtained for a premises, and, during the search, materials not listed in the warrant were found.

A second warrant for the premises was then obtained and executed. Subsequently, criminal charges against the suspects were dropped.

In a lawsuit for unlawful search and seizure, the court found that those involved in the first search were entitled to qualified immunity because they could rely on the magistrate's determination of probable cause, and a review of the warrant by two prosecutors.

The second warrant, however, was found to "obviously" lack probable cause, since it was based on the prior discovery of several checks and a ledger that were dated five years prior to the alleged fraudulent acts being investigated, which were plainly insufficient to provide probable cause. An investigator, therefore, was not entitled to qualified immunity on that second search.

Clearly, officers who either allegedly engaged in knowing misrepresentation themselves in an affidavit for a search warrant, or who have knowledge that another officer has done so cannot expect to be absolved of civil liability simply because a judge was misled into issuing a warrant.

In Schindler v. French, #05-4174, 2007 U.S. App. Lexis 941 (2nd Cir.), a federal appeals court reinstated a lawsuit against police officers for obtaining a search warrant and carrying out a search, based on allegations that they did so in bad faith, and knew that the supporting statements presented were misleading and false.

Resources

The following are some useful resources related to the subject of this article.

- Search and Seizure: Search Warrants. Summaries of cases reported in AELE publications.
- Findlaw Annotation on Searches and Seizures Pursuant to Warrant.
- Wikipedia Article, The Fourth Amendment

- The Constitution of the United States of America, Analysis and Interpretation: Analysis of Cases Decided by the Supreme Court of the United States by the Congressional Research Service, Library of Congress is available in a series of online browseable tables. Includes sections on Fourth Amendment warrant issues.
- Mark Stevens, Assistant Professor of Criminology, Calif. State University, Fresno, Lecture notes on Affidavits and Warrants.
- Boston (MA) Police Department, Rule 334: "Search Warrant Application and Execution" (June 14, 2006).
- Chandler (AZ) Police Department General Order D-34-100 "Search Warrants: Planning and Writing" (October 10, 2005).
- Cincinnati (OH) Police Department Procedure 12.700 "Search Warrants/Consent to Search" (Nov. 11, 2009).
- Georgia Association of Chiefs of Police, Sample Law Enforcement Operations Manual, Chapter 9: "Search and Seizure."
- Kenosha (WI) Police Department Policy and Procedure Manual, Chapter 1, Sec. 1.10 "Search and Seizure" (June 7, 2004).
- Form Affidavit for Search Warrant, Kentucky Court of Justice.
- San Francisco (CA) Police Department General Orders, DGO5.16 "Obtaining Search Warrants" (June 18, 1997).
- Virginia Department of Criminal Justice Services, Police/Sheriff's Department, General Order, Search Warrants (1999).
- Internal Revenue Service Manual, "Search Warrants, Evidence, and Chain of Custody."

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.

- Monthly Law Journal Article: Civil Liability and Affidavits for Search Warrants -- Part One, 2010 (4) AELE Mo. L. J. 101.

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Bernard J. Farber
Civil Liability Law Editor

P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

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