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Probable Cause: Veracity of Underlying Facts

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section 7, the Supreme Court could disregard that decision here, where the FPC ordered curtailments to prevent discrimination under section 4 of the act.[33]

In deciding this case the Court realized that a national problem existed that had to be solved to prevent disruption in the natural gas industry, and to protect the public. The FPC was properly acting under its general grant of authority in the absence of more recent congressional action.[34] This case should put other direct sale purchasers of gas for "inferior"[35] uses on notice that similar plans could be formulated by the FPC to protect the consuming public as the natural gas crisis becomes critical.

Ronald R. Gonzales

PROBABLE CAUSE: VERACITY OF UNDERLYING FACTS

Defendant was charged with possession of marijuana.[1] A search warrant, whereby the crucial evidence was obtained, was issued largely on the basis of statements made by a confidential informer which the affiant, a police officer, believed in good faith to be true. The district court sustained a motion to suppress[2] after an evidentiary hearing showed that the informer had lied as to the facts contained in the supporting affidavit. The Louisiana supreme court granted writs to review the sustaining of the motion to suppress. *Held*, the truthfulness of the facts set out in an affidavit supporting a search warrant may not later be attacked at a hearing on a motion to suppress. *State v. Anselmo*, 260 La. 306, 256 So.2d 98 (1971).

The question of whether the underlying facts supporting a finding of probable cause are actually true is a different one

33. 52 Stat. 822 (1938), 15 U.S.C. § 717(c) (1970).

34. *See generally* Fuch, *The New Administrative State: Judicial Sanction for Agency Self-Determination in the Regulation of Industry*, 69 COLUM. L. REV. 216, 244 (1969): "If actual abuse at the administrative level should take place, it would probably be checked by judicial reversal or new legislation; and action by the legislature to overcome overbold decisions by agencies or courts in the construction of statutes is available as well."

35. "Inferior" use is burning natural gas for industrial purposes where more abundant energy sources could be substituted. FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 8 (1961).

1. LA. R.S. 40:971 (3)(c) (Supp. 1970): "It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance...."

2. LA. CODE CRIM. P. art. 703A.

from whether the facts, assumed to be true, are sufficient to establish probable cause.[3] *Anselmo* is concerned with both of these questions, but only the question of actual veracity will be considered here.[4]

Whether to allow an attack upon the truthfulness of the underlying factual allegations in an affidavit supporting a search warrant is a question of first instance in Louisiana. The same may be said of the corresponding problem concerning the effect of material falsifications in the affidavit once such falsifications are made known to the court. The United States Supreme Court has expressly left the issue undecided[5] and the decisions of other state and federal courts offer little guidance. Some cases have reached the same result as *Anselmo*,[6] while others have allowed attack upon the factual veracity in varying degrees. An attack

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3. *See, e.g.*, Rugendorf v. United States, 376 U.S. 528 (1964); United States v. Gillette, 383 F.2d 843 (2d Cir. 1967); United States v. Halsey, 257 F. Supp. 1002 (S.D. N.Y. 1966); People v. Mitchell, 45 Ill.2d 148, 258 N.E.2d 345 (1970).

4. For excellent discussions of whether to allow attacks upon the veracity of the underlying facts see Comment, 19 U.C.L.A. L. REV. 96 (1971); Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971); Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B.J. 9 (1970); Comment, 63 J. CRIM. L.C. & P.S. 41 (Mar. 1972).

5. "Petitioner attacks the validity of the search warrant. This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause'; however, assuming, for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant here is valid." Rugendorf v. United States, 376 U.S. 528, 531-32 (1964). The court proceeded to imply that had there been perjury on the part of the affiant, the evidence would have been inadmissible: "The factual inaccuracies depended upon by petitioner to destroy probable cause . . . were of only peripheral relevancy to the showing of probable cause and, not being with the *personal knowledge* of the affiant, did not go to the integrity of the affidavit." *Id.* at 532. (Emphasis added.)

6. Dixon v. United States, 211 F.2d 547 (5th Cir. 1954); Kenney v. United States, 157 F.2d 442 (D.C. Cir. 1946); People v. Stansberry, 47 Ill.2d 541, 269 N.E.2d 431, *cert. denied*, 404 U.S. 873 (1971); People v. Nakon, 46 Ill.2d 561, 264 N.E.2d 204 (1970); People v. Mitchell, 45 Ill.2d 148, 258 N.E.2d 345 (1970); People v. Bak, 45 Ill.2d 140, 258 N.E.2d 341 (1970); People v. Healy, 126 Ill.App.2d 189, 261 N.E.2d 468 (1970); O'Brien v. State, 205 Tenn. 405, 326 S.W.2d 759 (1959); Poole v. State, 467 S.W.2d 826 (Tenn. Crim. App. 1971).

A disproportionate number of Illinois decisions are cited due to that jurisdiction's leadership in isolating and specifically considering the problem of veracity as opposed to sufficiency. *Contra*, United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971); Lerner v. United States, 151 A.2d 184 (D.C. Mun. Ct. App. 1959).

has been granted as a matter of right in a few decisions.[7] The better reasoned opinions have permitted an evidentiary challenge after an initial showing of substantial falsity or police perjury.[8] The Court of Appeals for the Fifth Circuit, while not deciding whether to allow an evidentiary hearing into the veracity of factual allegations, has required that evidence seized due to the misrepresentations of the affiant be suppressed once the court becomes aware of such falsification.[9]

In considering the instant case, it should be noted at the outset that there is a conflict as to exactly what the majority decided.[10] The court's opinion phrases the question as such: "The issue presented is whether the truthfulness of the facts set out in an affidavit supporting a search warrant may later be attacked at a hearing on a motion to suppress."[11] The majority answered this in the negative, with absolutely no qualifications. The concurring justices, however, pointed out that the holding is far too broad and as such should be considered dicta.[12] This criticism appears valid since the only issue before the court was whether an attack, via a motion to suppress, should be allowed on the truthfulness of facts derived from a *confidential informer* where the affiant, *in good faith*, believed them to be true. Al-

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7. *See* United States v. Roth, 391 F.2d 507, 509 (7th Cir. 1967); United States v. Freeman, 358 F.2d 459, 463 n.4 (2d Cir. 1966)(dictum); King v. United States, 282 F.2d 398 (4th Cir. 1960); United States v. Pearce, 275 F.2d 318, 322 (7th Cir. 1960); United States v. Scott, 331 F. Supp. 233 (D. D.C. 1971); United States v. Poppitt, 227 F. Supp. 73 (D. Del. 1964); Lerner v. United States, 151 A.2d 184 (D.C. Mun. Ct. App. 1959); Barker v. State, 241 So.2d 355 (Miss. 1970); O'Bean v. State, 184 So.2d 635 (Miss. 1966); Henderson v. State, 490 P.2d 786 (Okla. Crim. App. 1971); *cf.* United States *ex rel.* Mayfield v. Pate, 451 F.2d 1381 (7th Cir. 1971).

8. United States v. Dunnings, 425 F.2d 836 (2d Cir. 1969), *cert. denied*, 397 U.S. 1001 (1970); United States *ex rel.* DeRosa v. La. Vallee, 406 F.2d 807 (2d Cir. 1969); United States v. Gillette, 383 F.2d 843 (2d Cir. 1967) (dictum); United States v. Suarez, 380 F.2d 713 (2d Cir. 1967) (dictum); United States v. Halsey, 257 F. Supp. 1002 (S.D. N.Y. 1966); Theodor v. Superior Court, 21 Cal. App. 3d 474, 98 Cal. Rptr. 486 (Ct. App. 4th D. 1971); People v. Solimine, 18 N.Y.2d 477, 223 N.E.2d 341, 276 N.Y.S.2d 882 (1966); People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

9. "Once it came to the attention of the court . . . that evidence had been seized on the basis of statements of facts erroneously made by the affiant . . . the court was required to grant the motion [to suppress]." United States v. Upshaw, 448 F.2d 1218, 1222 (5th Cir. 1971).

10. *See* the concurring opinions of Justices Tate and Barham, State v. Anselmo, 260 La. 306, 322-24, 256 So.2d 98, 104-05 (1971).

11. *Id.* at 313, 256 So.2d at 101.

12. "The opinion is far broader than the narrow question presented for our determination. I take issue with the dictum . . . ." *Id.* at 324, 256 So.2d at 105.

though the majority opinion may properly be considered dicta in part, it nevertheless shows the inclination of our present court and therefore merits examination.[13]

If one grants the correctness of the majority's basic premise —that probable cause may rest on perjurious allegations by the affiant—then the court's holding logically follows. The court pointed out that a defendant aggrieved by an *unconstitutional* search may move to suppress the evidence under Article 703 of the Code of Criminal Procedure. The constitutional requirement for a search warrant is that none shall issue except "upon probable cause, supported by oath or affirmation."[14] The court then quoted from various opinions which attempted to define probable cause.[15] The thrust of these decisions was that the constitutional requirement of probable cause is satisfied if a neutral and independent magistrate makes the determination, based upon representations in the affidavit, that there is a substantial likelihood that criminal activity has taken place. In *Anselmo*, an independent judicial officer determined from a sworn affidavit that there was a substantial likelihood that criminal activity had taken place. Thus, the search was constitutional. Since only an unconstitutional search may be attacked by a motion to suppress, the defendant could not properly challenge the search.[16]

The majority supported their conclusion by two principal considerations: the public interest in preserving an effective informer system,[17] and the fear that by allowing an evidentiary hearing a motion to suppress might take on the characteristics of a full-scale trial and lengthen an already protracted criminal process.[18]

The conclusion reached in *Anselmo* is probably incorrect in permitting evidence obtained by employing a search warrant issued on the basis of intentional or negligent misrepresentations of a police officer to be admissible at trial. There are sev-

13. Hereinafter, references to the court's holding will be to the broad rule of law laid down in the majority opinion.
14. U. S. CONST. amend. IV.
15. Spinelli v. United States, 393 U.S. 410 (1969); State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964).
16. *See* note 6 *supra*.
17. 260 La. at 321, 256 So.2d at 104.
18. *Id.* at 320-21, 256 So.2d at 104.

eral reasons why such a result might be ill-advised, foremost among them is a lack of the constitutionally required probable cause.[19] As pointed out by Justice Barham: "Probable cause is a state of mind. If there is no probable cause in the mind of the affiant, there can be no basis for legal probable cause upon which a warrant can stand."[20] Another result of allowing such evidence into trial would be to tacitly approve police perjury.[21] Knowing that the evidence would be admissible, the police would have strong incentive to slant testimony in order to meet the prerequisites for issuance of a search warrant. Since there could be no attack upon the factual veracity of the affidavit, the risk of impropriety being discovered is virtually non-existent.

However, the opinion of the court seems correct insofar as it is limited to the precise factual situation properly before the court—where a confidential informer lied and the affiant believed in good faith that he was stating the truth. As pointed out by the court, the paramount public interest in a viable informer system would be seriously impaired if the state had to produce its informer to counteract the defendant's allegations of informer falsification at every hearing on a motion to suppress.[22] Also, the requirement of probable cause is satisfied where the police officer justifiably believes in, and in good faith swears to, the truthfulness of an affidavit which is also passed upon by the issuing judge, even if the facts are later proved false.[23]

A proper conclusion in this area of the law, as suggested by the concurring opinions, is to draw a distinction between the

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19. People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965); Henderson v. State, 490 P.2d 786 (Okla. Crim. App. 1971); *see also* Rugendorf v. United States, 376 U.S. 528, 532-33 (1964) (dictum); Jones v. United States, 362 U.S. 257, 271 (1960) (dictum).

20. 260 La. at 324, 256 So.2d at 105.

21. *Id.* at 323, 256 So.2d at 104-05; Younger, "The Perjury Routine," 204 THE NATION 596-97 (1967); *cf.* McCray v. Illinois, 386 U.S. 300, 316 n.2 (1967) (dissenting opinion).

22. *E.g.*, McCray v. Illinois, 386 U.S. 300 (1967); Rugendorf v. United States, 376 U.S. 528 (1964); Roviaro v. United States, 353 U.S. 53 (1957); Scher v. United States, 305 U.S. 251 (1938); People v. Bak, 45 Ill.2d 140, 258 N.E.2d 341 (1970); State v. O'Brien, 255 La. 704, 232 So.2d 484 (1970).

23. *See* Dumbra v. United States, 268 U.S. 435 (1925); Stacy v. Emery, 97 U.S. 642 (1878); DiPiazza v. United States, 415 F.2d 99 (6th Cir. 1969). Although these cases deal with the probable cause necessary for an arrest without a warrant, *Spinelli v. United States*, 393 U.S. 410, 417 n.5 (1969) states that the analysis is basically the same as that used in determining probable cause for the issuance of a search warrant.

misrepresentations, whether intentional or negligent, of the police officer and the misstatements of the informer whom the police officer justifiably and in good faith believed to be telling the truth. In the latter instance, the evidence would be admissible, while in the former it would not. Support is given to this distinction by *Mapp v. Ohio*,[24] which established the principle that the purpose of the fourth amendment is to prevent unreasonable police behavior and not improper activity on the part of private citizens.

If this distinction is accepted, the problem then becomes one of determining when to allow an inquiry into the factual veracity of the affidavit. Considering the divergent policy considerations,[25] a proper answer might be to require that a contradictory hearing be held only after the defendant has made an initial showing creating a strong suspicion that there has been intentional or negligent misrepresentations by the police officer, affiant.[26]

Randolph W. Hunter

AN EXCEPTION TO THE RULES OF FORM AND PAROL EVIDENCE

Offeror signed an agreement to purchase several lots, but the offeree's signature did not appear in the agreement; however, his name was typed above offeror's signature. The deposit stipulated in the written agreement was accepted by offeree. Later, offeree delivered title to one of the lots described in the agreement which was accepted by offeror. Offeror sued for the balance on deposit, asserting that the agreement was not legally binding because it was never accepted in writing. The trial court held that the agreement was valid. In affirming, the Fourth Circuit Court of Appeals *held*, in a contract to sell immovables which lacks the offeree's signature, the acceptance can be proved by some unequivocal act showing the offeree's assent to the offer.[1] *Alley v. New Homes Promotion, Inc.*, 247 So.2d 218 (4th Cir.) *writs refused*, 258 La. 972, 248 So.2d 832 (1971).

24. 367 U.S. 643 (1961).

25. The public interest, in insuring that the facts alleged in the affidavit are actually true, conflicts with the equally important interest of protecting the anonymity of the informer and insuring a speedy criminal process.

26. *See* note 8 *supra*.

1. It is recognized that the issue concerning the formal requirements in the instant case was not critical to the decision since the court found