

SEARCH & SEIZURE IN NEW MEXICO

ONLINE

**PART ONE: SEARCH WARRANTS
(Probable Cause)**

PRESENTED BY:

DPS – Law Enforcement Academy
Santa Fe, New Mexico

Date: _____

GOALS

- Students will learn how to establish probable cause in a search warrant affidavit
- Students will be able to review a search warrant affidavit to determine if probable cause exists.
- Students will learn to anticipate legal problems that may arise in the execution of a search warrant and how to overcome them.

OBJECTIVES

Upon completion of this course, students will be able to:

- Articulate the importance of including as much as possible in a search warrant affidavit.
- Know what personal qualifications to include when beginning an affidavit.
- Explain the two prong test (reliability and basis of knowledge) needed to establish probable cause in a search warrant.
- List the possible sources of information for a search warrant affidavit and the importance of noting the source of information in the affidavit.
- State what is needed to obtain authorization for a night-time search warrant.
- Understand the legal requirement of knock-and-announce.
- Understand legal problems and challenges that may arise during execution of a search warrant and how to overcome them.
- State what to do when a non-resident is present during the execution of a search warrant. .

SOURCES

- New Mexico Criminal and Traffic Manual.
- New Mexico Statutes Annotated.
- State and federal case law.

ESTIMATED TIME

Included in fifteen (15 hour) block on Search & Seizure.

PREPARED BY

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DATE APPROVED _____

ACCREDITATION NUMBER _____

INTRODUCTION

The lesson plan on search warrants is divided into two parts:

- Establishing probable cause in a search warrant.
- What to do when serving a search warrant.

Challenges to a Search Warrant

A search warrant issued by a Judge is often challenged by a defendant in one of the following ways:

1. Insufficient probable cause on the face of the affidavit or warrant.
2. Knowing or intentional false statements or omissions in the affidavit.
3. Staleness of information.
4. Lack of particularity in describing place, person or things.
5. Improper execution of warrant.

We will be discussing these challenges. We will review what is needed to establish probable cause in a search warrant.

ESTABLISHING PROBABLE CAUSE IN A SEARCH WARRANT

BACKGROUND

The Fourth Amendment to the Constitution - the search and seizure amendment - requires a warrant to search or seize a person or their property.

How important is a search warrant: A person's home is like a castle

“A person's home is their castle.” Over two hundred ago an English statesman, William Pitt, speaking to English legislators, said it best:

“The poorest man may, in his cottage, bid defiance to all the forces of the Crown. The cottage may be frail; its roof may shake, the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his forces dare not cross the threshold of his cottage.”

Definition of a search warrant

A judicial writ signed by a Judge authorizing the search of a person or premises or both.

Why does the Constitution (the Fourth Amendment) require a search warrant?

- Many people at the time of the drafting of the Constitution (1787) were upset that officials would search houses and personal belongings for no reason at all.
- One consequence of requiring a search warrant is having an independent Judge, not law enforcement, make the final decision whether to seize someone or their property.

What are the advantages for police officers in having a search warrant?

- ANS. 1) **If there is a motion to suppress evidence, a search warrant shifts the burden from the prosecution to the defense.**
- 2) **A search warrant protects a police officer in civil lawsuits. It is a court order issued by an independent Judge (who has judicial immunity and cannot be sued) which commands an officer to search a person or place.**

Consequences in drafting a warrant

- If a warrant is good the prosecution should prevail.
- But if the warrant is not done correctly, or rules not followed in executing it, the evidence will be suppressed. Unfortunately, evidence suppressed can affect the outcome of a case.

The “four corners” doctrine

- We must put everything in the warrant. At a motion hearing we cannot orally add things to clarify what we meant. We are bound by what lawyers call the “four corners of the document.”

Basic components of a warrant

A search warrant has two major parts:

1. The affidavit - Part I
2. The warrant - Part II

Part I (the affidavit) is divided into three parts:

1. Premises to be searched.
2. Items to be seized.
3. Probable cause.

Part II (the warrant) is signed by the Judge.

PART I: THE AFFIDAVIT

1) **Premises or place to be searched**

- The Fourth Amendment specifically requires that a search warrant “particularly describes the place to be searched.”
- The affidavit includes the place to be searched. It should be in such detail that anyone handed a copy of the warrant could find the premises to be searched.
- It is important to have detailed descriptions of the places, persons and things to be searched.
- The description of the place to be searched should be identical in the affidavit and the warrant.
- In some cases, officers may wish to use diagrams or photographs.

2) **Items to be seized**

- The affidavit includes items to be seized. Failure to list an item to be seized may require getting a second warrant.
- A peace officer is responsible for the affidavit. We will now discuss the part of the affidavit challenged the most in court: probable cause.

3) **Probable Cause Narrative**

This is the third part of the affidavit portion of the warrant. Peace officers and lawyers often refer to this portion as “the affidavit.” It begins as follows:

- and the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows (include facts in support of the credibility of any hearsay relied upon):

Need to establish your personal qualifications for preparing a search warrant

- Officers should cite their training and experience relevant to the crime under investigation as a basis for their knowledge. Examples follow:
- I’m a certified police officer in the State of New Mexico and currently employed as a full-time salaried police officer for the City of _____.

- I have been a police officer for _____years
- I'm currently assigned to the investigations division of the _____ Police Department.
- During the course of my official duties I received both classroom and on the job training in the investigation of _____ crimes.
- During the course of my official duties I became involved in the investigation of . . .

These are some suggestions. It is unnecessary for an officer, when doing a complaint or arrest warrant, to provide additional qualifications. But in seeking a search warrant, it is helpful for a Judge to have an idea of additional training or experience (example: narcotics, sex crimes, etc.) that you might have.

Key points in writing a probable cause narrative

- Provide sufficient facts to show probable cause why a person or premises should be searched.
- Use facts, not conclusions.
- Some officers refer to themselves as “Affiant.” Other officers use “Affiant (I)” and thereafter use “I” only. It’s a matter of choice.
- Information from another source? Always state who gave you information.
- Indicate how the other party got the information.

A note of caution

The affiant must be careful when using hearsay from another officer. There is a tendency to summarize observations and put them in the affiant’s name. By doing so, affiant is making a material representation of fact.

Judge must make independent decision

- The affidavit must contain sufficient facts to enable the issuing Judge independently to pass judgment on the issuance of probable cause.

The legal standard for probable cause in a search warrant

- Probable cause is based upon substantial evidence, which may be hearsay

in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information received. NMRA, Rule 5-211 (E).

This definition is the basis for the two pronged test, which lawyers refer to as the Aguilar-Spinelli test, that is the basis for probable cause in a search warrant in New Mexico.

The two-prong test consists of:

A. Reliability - Why is the source of information credible or reliable?

B. Basis of knowledge -

How did the person giving you the information get the information?

Can we use hearsay (information from a third party) in a search warrant?

ANSWER: Yes

Legal cases on the “two prong” Aguilar-Spinelli test

FIRST PRONG: RELIABILITY Aguilar v. Texas, 378 U.S. 108 (1964).

- In Aguilar, the court held an affidavit insufficient when it stated that “Affiants have received information from a credible person and do believe” that illegal drugs and paraphernalia were being kept at a particular residence.
- Why is this affidavit insufficient?

Answer:

It doesn't tell us why the affiant believes that this person is credible. Instead, it simply gives us a conclusion: “Affiants have received information from a credible person.”

SECOND PRONG: BASIS OF KNOWLEDGE Spinelli v. U.S., 393 U.S. 410 (1969).

- In Spinelli, the court held an affidavit insufficient where it stated that Spinelli “was a known gambler and associate of gamblers . . . “
- Why is this affidavit insufficient?

Answer:

It doesn't tell us how the affiant knew that Spinelli was a known gambler. Where did the affiant get this information? Why does he believe Spinelli is a gambler? Who told him? Instead, it simply gives us a conclusion: “Spinelli was a know gambler.”

There are a number of ways that an affiant can get information. We will now look at these sources of information and evaluate the reliability of the information they provide.

Possible sources of information for affidavit narrative

Information for an affidavit generally comes from one or more of the following sources:

a. Personal knowledge of officer filling out affidavit (affiant)

An officer who sees an offense from beginning to end, and uses no hearsay, is presumed reliable. We must still establish, however, the basis of knowledge. In other words, how does the officer know? If the officer is the only witness this should be easy.

b. Information provided by other officers (presumed reliable)

c. "Concerned citizen" informant

There are two types of concerned citizen informants:

1. Concerned citizen whose name appears in the affidavit

This is often the victim or eyewitness. The person is willing to disclose their identity and is not receiving any benefit from providing the information. When a person's name is used in a warrant, or the person is a concerned citizen not working off charges or for monetary reward, that person is presumed reliable.

2. Concerned citizen known to affiant but wishes to remain anonymous

A concerned citizen may request, usually for reasons of personal safety, to remain anonymous. Additional facts should be added to qualify the person as a reliable witness.

d. Confidential Informant (CI)

An individual who provides information in exchange for:

1. money,
2. an agreement not to prosecute criminal charges, or
3. a favorable plea agreement involving pending criminal charges.

A CI is presumed not reliable.

e. Crime Stopper/anonymous informant

A person who refuses to reveal his or her identity to the police.

f. Unwitting informant

A person who does not realize that he or she is talking to an undercover police officer.

g. Dogs - Used to find drugs, people or explosives.

SCENARIOS REGARDING PROBABLE CAUSE NARRATIVES

- The remainder of the class will be scenarios to help us understand the two prong test of reliability and basis of knowledge.

SEARCH WARRANT AFFIDAVIT NO. 1

The affidavit contained the following information:

- That within the last 24 hours, Affiant has been contacted by a Confidential Informant, who advised that a subject driving a red Chrysler Cordova with Texas plates, was currently selling heroin at a residence at 1106 South Cahoon. That subject John Doe was from out of town and had brought the heroin in.
- That said informant stated that subject was a Spanish male, approximately 6-0 tall, weighing a little over 200 pounds, having black hair and did have some tattoos on his person.
- That Said Informant did state through personal knowledge, several heroin users had been to his residence.
- That Said Informant has furnished information to Affiant in the past which Affiant did find to be true and correct through personal knowledge and investigation.
- That based on the information provided by Said Informant, Affiant did drive by the residence and did observe the red Cordova which did have a partial white vinyl roof. Description and the trailer house next to the house are the same as stated by Informant. Also, on checking utilities, it was learned that a Carol Cordova resided at this address.

Legal Analysis

- Defendant was convicted of Possession of Heroin. State v. Cordova (1989).
- We will now evaluate the sources of information based upon the two prong (reliability and basis of knowledge) test.

SEARCH WARRANT AFFIDAVIT NO. 1 - CON'T

RELIABILITY PRONG

- The CI is reliable because it has provided information that has proven to be true and correct in the past. Note fact number 4: that Said Informant has furnished information to Affiant in the past which Affiant did find to be true and correct

through personal knowledge and investigation. The CI is reliable and that prong of the test – reliability – was satisfied.

Recommendation:

Although the State prevailed in this case, officers should put in more information. For example, “the CI has provided information in the past that has led to arrests and convictions” or “the CI has provided information in the past that has led to recovery of stolen property.”

BASIS OF KNOWLEDGE PRONG

- This prong was not satisfied because we do not know how the CI got its information. Note fact #3: That Said Informant did state through personal knowledge, several known heroin users has been to his residence.

How did the CI gather this information?

How did the CI know they were heroin users?

The CI refers to them as heroin users but how does the CI know this?

The CI may be a truthful person but got its information through rumor, hearsay, gossip, etc. We have no way of knowing.

Suggestion:

“The CI is familiar with heroin and has been in the residence and seen heroin in the residence.”

- Also, the officer in fact #5 drove by the residence and verified that the house and car existed. That may be true but these are innocent facts in themselves . . . does this mean that a six foot tall Spanish male with tattoos selling heroin also exists there?

Conclusion

- **Supreme Court reversed conviction because of failure to satisfy the “basis of knowledge” test. State v. Cordova, 109 N.M. 211 (1989).**

Reminder

We must satisfy both prongs – reliability and basis of knowledge – when we do a search warrant affidavit.

SEARCH WARRANT AFFIDAVIT NO. 2

The affidavit contained the following information:

- The Affiant, Luis Lara, is a full-time salaried law enforcement officer with 14 ½ years experience and certified by the State of New Mexico. Currently

serving as a Lieutenant with the Chaves County Sheriff's Office.

- On 8-1-88 Affiant received information from the Chaves County Crime-Stopppers that a caller advised that, at the location described on the face of the search warrant, a subject known to him as Steve lives there and is growing a marijuana patch behind a barn west of the house.
- The caller advised that he is familiar with marijuana and knows what marijuana plants look like.
- Affiant did follow the caller's directions and located an older model yellow El Camino which the caller described and also a red/white Ford p/u which the caller described at the residence which also had a small shed or barn southwest of the residence.
- Sgt. Troy Grant advised Affiant that a Confidential Informant which Sgt. Grant personally knows to be reliable stated that subjects at that described residence would be stripping the plants and moving them out before morning.
- Affiant, who has approximately 12 years experience in narcotics investigation, does know that people who grow marijuana and process marijuana after stripping the plants will process, weigh, and package it inside the residence or in an enclosed area.

Legal Analysis Conviction Overturned!!!

- Defendant was convicted of Possession of More than Eight Ounces of Marijuana. State v. Therrien (1990).
- We will now evaluate the sources of information based upon the two prong (reliability and basis of knowledge) tests.
 - What about the confidential informant?
 - What about the crime stoppers tip?

RELIABILITY PRONG - CONFIDENTIAL INFORMANT

- Note fact #5: a confidential informant which Sgt. Grant personally knows to be reliable. That is a conclusion. We are unable to determine, as a neutral and detached magistrate has to do, the reasons why this particular CI is reliable.

- Has the CI given information in the past which has proven to be true and correct? Did this information result in arrests, convictions, seizures of evidence? If so, Sgt. Grant should have included that in the warrant.
- What else should we know about the confidential informant? Is it working for monetary reward? Has it been advised that it would receive a monetary reward only if the information proves to be true and correct? Is the CI working off charges? Has the CI been advised that charges will be reduced or dismissed only if its information is true and correct?
- The Affiant simply says the CI is reliable. The affidavit fails to provide any underlying circumstances from which a Judge can make an independent determination as to the reliability of the CI.

RELIABILITY PRONG - CRIME STOPPERS TIP

- A crime stoppers tip, anonymous as it is, is presumed not reliable. A home will not be searched based upon an uncorroborated anonymous telephone call. The function of such a tip is to direct police investigative activities, not substitute for them.
- This is because there is no way to evaluate the reliability of an anonymous telephone call. We cannot evaluate the motive of the caller nor know if the caller is reporting rumor as personal knowledge.

Conclusion

- **Court of Appeals reversed conviction because of failure to satisfy the “reliability” test. State v. Therrien, 110 N.M. 261 (Ct. App. 1990).**

SEARCH WARRANT NO. 3

The affidavit contained the following information:

- Affiant (a Village of Logan Police Officer) knows Defendant lives in a green and white camping trailer and has been to his previous address in Logan, New Mexico.
- Affiant observed his previous residence on four occasions for approximately an hour. Affiant witnessed as many as seven vehicles and as few as two vehicles come to the residence and stay for approximately five minutes.
- Defendant moved his trailer to the Arrowhead RV Park where Affiant observed the same type of traffic.
- Within the past 48 hours a Region V Drug Task Force confidential informer was at

Defendant's residence. While there, the informant observed Defendant handling a large amount of marijuana.

- The marijuana was packaged in clear sandwich type bags and stored in a clear zip-lock type bag.
- Affiant believes this informant to be credible because the informant has performed at least two supervised controlled purchases of quantities of controlled substances.

Legal Analysis

- Defendant appealed his conviction, pursuant to a conditional plea agreement, for distribution of marijuana and possession of drug paraphernalia.
- Has the reliability of the confidential informant been established?

“Reliability prong - Confidential Informant

- To review reliability, for this case, two factors should be considered:
 1. Did the informant provide reliable information to police officers in the past?
 2. Was there an independent investigation to corroborate informant's information was reliable?

Has the informant given reliable information to police officers in the past?

- The affidavit had conclusions, not actual evidence that informant provided reliable information in the past.
- For example, the affidavit noted only that the informant cooperated with officers while under supervision to make two purchases of controlled substances.
- Without more information about the two controlled buys, the affidavit did not directly address the informant's previous reliability in obtaining and relating information about criminal activity.

Was there independent investigation to corroborate informant's information?

- The affiant's observations were made some time before the informant's activities.
- If the affiant had made his observations (traffic patterns consistent with drug trafficking) at the same time as the informant, it might have corroborated the informant's observations and assisted the informant's credibility or reliability.

- Since there was no timely corroboration of the informant's information, and no indication that the informant provided reliable information to officers in the past, the reliability prong was not satisfied.

Conclusion

- Court of Appeals held the affidavit was insufficient to support a finding of probable cause to issue the warrant. State v. Vest (2011).

SEARCH WARRANT AFFIDAVIT NO. 4

The affidavit contained the following information:

- On 12/15/88 at approximately 1930 hours, Gaylynn Ledbetter closed the establishment known as Jaynie's Beauty Salon and Nelle's Floral. At that time, the business was intact.
- At approximately 2200 hours, witnesses observed Hector Hernandez and Matthew Hooten and another unidentified subject by Nelle's Floral.
- At approximately 0716 hours on 12/16/88, the Artesia Police Department was advised that a burglary had taken place at Nelle's Floral and Jaynie's Beauty Salon.
- Officers arrived at the scene and processed the crime scene. The investigation revealed blood located at the scene where the perpetrator had cut himself or herself.
- Officers found several items that the suspect or suspects had taken from the burglary outside the premises. Items were dropped in several places. The trail of items led in the direction towards the Hector Hernandez residence on 802 S. 2nd.
- On 12/16/88, Officer Wright and Lt. Ramon Chavarria observed Hector Hernandez walking west on Washington. Officer Wright and Lt. Chavarria stopped Hector and talked to him. Officers observed a cut on Hector's hand with dried blood, and the cut appeared to be fresh.
- On 12/16/88, Officer Wright contacted ADA Terry Haake and he advised that probable cause existed to search the premises at 802 S. 2nd and Hector Hernandez.

Legal Analysis Conviction Overturned!!!

- Defendant was convicted of Burglary, Larceny, and Criminal Damage to Property. State v. Hernandez (1990).
- We will now evaluate the sources of information based upon the two prong (reliability and basis of knowledge) test.

RELIABILITY PRONG AND BASIS OF KNOWLEDGE PRONG

- Note fact number 2: at approximately 2200 hours, witnesses observed defendant by the location of the burglary. The general rule is that where the source of the information is a citizen-informant who is a victim or eyewitness to a crime, reliability is presumed and need not be further established. This is in contrast to the confidential informant.
- But here we have no facts to determine if the witnesses are citizen-informants or confidential informants. The court cannot determine the status of the people giving the affiant information. Without this, we cannot evaluate either the reliability prong or basis of knowledge of prong.
- A number of questions need to be asked:
 - Who advised the police department about the burglary at 0716 hours? Was it a confidential informant or a concerned citizen?
 - Was the caller at the scene when police responded to the call?
 - Was the caller a witness to the burglary at 2200 hours the night before?
 - Was the caller a witness to the burglary or did the caller get its information from other people?

ANSWER:

- **There is no indication of the circumstances in which the reported information was communicated to the police. A Judge cannot determine whether the witnesses were unknown and anonymous, or whether they were known to the police but wished to remain anonymous. There was no indication of the witnesses' identities, observation or communication of their observation to the police.**

Conclusion

- **Court of Appeals reversed conviction because of failure to satisfy the “reliability” test. State v. Hernandez, 111 N.M. 226 (Ct. App. 1990). The**

affidavit also failed to satisfy the “basis of knowledge” test.

SEARCH WARRANT AFFIDAVIT NO. 5

- In New Mexico, before a valid search warrant may issue, there must be substantial evidence in the supporting affidavit to show:
 - 1) that the items sought to be seized are evidence of a crime, and
 - 2) that the criminal evidence sought is located at the place to be searchedNMRA, Rule 5-211, State v. Herrera, 102 N.M. 254 (1985).

The affidavit contained the following information:

- On May 24, 1989, David Hudson was confronted by Danny Calloway and defendant William Sansom during an outing along the Pecos River.
- Calloway asserted that Hudson had made unflattering remarks directed at Calloway’s wife, and Hudson and Calloway began exchanging blows.
- When friends of Hudson attempted to go to his aid, defendant Sansom took a .22 caliber rifle from a pickup truck, pointed it at them, and verbally threatened them with injury if they came closer.
- After Hudson had been beaten, witnesses observed Calloway and defendant Sansom return to a 1974 red and white GMC pickup with New Mexico license plate number LC8767, with the rifle, and drive away from the scene.
- A witness to the assault located the same pickup truck the next day in front of a trailer located at 5409 Gramma Road, north of Roswell, New Mexico.
- Affiant confirmed that the same pickup truck was located next to the described trailer and sought a warrant.

Legal Analysis

Conviction Overturned!!!

- A search warrant was issued and a .22 rifle was found inside the trailer. Defendant was convicted of Aggravated Assault and Felon in Possession of a Firearm.
- Do we have sufficient information to establish that the criminal evidence (rifle) will be located at the place to be searched?

- LEGAL RULE:
An affidavit must directly establish or permit a reasonable inference that a suspect resides at the premises to be searched.

Court analysis of the affidavit

- The only fact was that the truck was parked in front of the trailer.
- There was nothing in the affidavit to suggest that the evidence (the rifle) would be in the trailer.
- The affidavit contained no facts other than the location of the described truck in front of the described trailer.
- No fact, based on motor vehicle division information, was presented as to ownership of the truck.
- No fact, based on property ownership documents, was presented as to the ownership of the truck.

Conclusion

- Court of Appeals REVERSED conviction. It held there were insufficient facts to permit the required independent determination of whether probable cause to search the trailer existed.
State v. Sansom, 112 N.M. 774 (Ct. App. 1991).

Reminder

- In addition to the “reliability” prong and the “basis of knowledge” prong, don’t forget to address the obvious but sometimes overlooked question:

WHY IS THE EVIDENCE AT THE PARTICULAR PLACE TO BE SEARCHED?

If we believe that the evidence is at a residence because defendant resides there, we need to show facts that indicate defendant does reside there.

News item: Judge: Search Was Unlawful

A deputy sheriff in Bernalillo County was killed at a traffic stop. There was a massive manhunt for the defendant. One of the things the Sheriff’s department did was to get a search warrant for relatives of the defendant. One of the relatives was a retired state police officer. He and his family filed a lawsuit in federal court against the Sheriff’s department.

The federal judge held that “. . . a close familial relationship is not enough, standing alone, to provide probable cause.” The detectives’ use of the search warrant violated their fourth

amendment rights. Albuquerque Tribune, September 28, 2007.

News item: Astorga Kin, Sheriff Reach Deal

The in-laws of deputy slaying suspect Michael Paul Astorga reached a settlement with the Bernalillo County Sheriff's Department after an appeals court ruled the family was the subject of an illegal search by investigators.

The appeal filed by the ACLU claims Astorga's relation to them did not give authorities probable cause to obtain a search warrant of their home or vehicle. The settlement amount was not immediately known. Albuquerque Journal, October 16, 2009.

Facts:

A fifteen-year-old girl told a Bernalillo County Sheriff's Detective that a family member, nineteen-year-old Jerry Trujillo, Jr., who lived in the same house, had molested her. Her cousin told the detective she also had been molested and stopped going to the Trujillo house because of what the Defendant did to her.

A search warrant affidavit was drawn up: State of New Mexico v. 1208 Juanita SW, Albuquerque, NM. The residence was described in great detail and the detective often referred to "the residence" or "the Trujillo home." It concluded by requesting a warrant to search "this residence for evidence . . ."

Letters and pornography were seized which confirmed what the two victims had told the detective. But there was something missing in the affidavit: it did not clearly establish that the residence to be searched and 1208 Juanita SW were one and the same.

- Will the evidence be admissible in court? (yes, but just barely)

Answer:

It was a close call but the Supreme Court, noting they easily could have ruled the other way, held the evidence was admissible. State v. Trujillo (2011).

Reminder:

An officer or detective should always include the address of the location to be searched in the affidavit and state why he or she believes the evidence will be found at that location.

SEARCH WARRANT AFFIDAVIT NO. 6

The following affidavit involves an unwitting informant. An unwitting informant is one who is with a confidential informant or undercover officer and is unaware of the investigation.

The affidavit contained the following information:

- Detective Andrew Perez of the Albuquerque Police Department seeks a search warrant to search Room Number 16 at the Relax Motel in Albuquerque.

- Within the past three days, a confidential informant, with whom Detective Perez has worked in the past, told Perez that the confidential informant (CI) has knowledge of a person who knew where to buy cocaine.
- The CI introduced Perez to this person, who was referred to in the affidavit as the “unwitting informant.”
- The unwitting informant (UI) told Perez that the UI could take Perez to a motel to buy cocaine. The UI got into Perez’s car and Perez drove, at the UI’s direction, to the Relax Motel.
- Perez gave the UI some money, and he observed the UI walk up to Room Number 16 and knock on the door. Perez then observed the UI go into the room and come out three minutes later. The UI got back into the car and handed Perez a paper bundle filled with a substance that tested positive for cocaine.
- The affidavit further stated that this routine was repeated at the motel room later that same day, with the same results.

Legal Analysis

- Defendant pled guilty to Possession of Cocaine, reserving the right to challenge the search warrant. Good warrant?

ANSWER:

Defendant’s conviction was affirmed on appeal. The Court of Appeals noted that the reliability/basis of knowledge test applies only to hearsay (what others tell you) information. It does not apply to an officer’s personal observations. In this case the officer observed the unwitting informant make the illegal transaction.

The officer’s reliability and personal knowledge were sufficient to establish probable cause to search the motel room. State v. Lovato (1994).

Using statements by an unwitting informant in a search warrant to help establish probable cause

- A confidential informant or officer may wear a wire and record the unwitting informant’s statements. It could, for example, be arranging a drug buy or contacting a fence.
- These statements may be used to show probable cause.
- The reason that these statements are admissible is that the unwitting informant does not have the credibility problems of a confidential informant since there is no motive to mislead for misconduct.

SEARCH WARRANT AFFIDAVIT NO. 7

- The following warrant was issued for the residence of directors of a group home for mentally retarded men in Belen, New Mexico.
- The district court Judge threw out some 200 photographs that purportedly show the directors sexually molesting up to 20 mentally retarded men or showing them naked.
- The Judge said the warrant was poorly prepared.
- No appeal was made by the State.
- The District Attorney, who had been in office approximately nine years, was much criticized. This was a high profile case and he lost the next election.
- We cannot determine reliability unless we know who gave an affiant his or her information.
- As you review the search warrant, noting the reliability/basis of knowledge guidelines, ask yourself this question:

WHO GAVE THE AFFIANT HIS INFORMATION?

AFFIDAVIT FOR SEARCH WARRANT

On August 27, 1990 affiant received a report of a sexual assault that allegedly occurred at #37 Mallette Road in the Tierra Grande Estates of Valencia County. Subsequent investigation by affiant revealed that the victim is Kenneth Thornton, age forty five but who has a diminished mental capacity and is also speech impaired.

Additional investigation conducted by affiant revealed that Kenneth Thornton was picked up at his residence, 1007 Dillon, by Alberto Martinez at approximately 10:00 a.m. on Saturday August 25, 1990, for the purpose of employing Kenneth Thornton to do some yard work.

Pursuant to interviews conducted by affiant, Kenneth did perform some yard work and after completing his work, requested payment. Kenneth Martinez then asked Thornton into the residence where Alberto Martinez then served Kenneth Thornton several drinks of hard liquor.

Kenneth Thornton again asked Alberto Martinez for payment and Martinez again served Kenneth Thornton several more shots of liquor.

Kenneth Thornton then decided to leave and Alberto Martinez then took him by the hand and led him down the hallway of the residence to . . . bedroom.

Alberto Martinez then proceeded to bend Kenneth over the bed, pulled his pants and

underwear down and proceeded to fondle the rectal and genital areas of Kenneth Thornton.

Alberto Martinez then lowered his shorts and underwear and proceeded to penetrate Kenneth Thornton rectally.

During the interview that affiant conducted, affiant was advised that during the incident Alberto Martinez had taken photographs of him in the bedroom.

Alberto Martinez then returned Kenneth Thornton back to his residence. . . .

News Item: Looking for Justice

Kenneth Thornton may not have the same mental ability as other 45-year-olds but he knows one thing for sure: He was raped. And now he fears that the man will go unpunished. Kenneth Thornton: “He hurt me . . . I want to know why no one’s something about it.” Albuquerque Tribune, March 2, 1992.

Conclusion:

Officers on the search warrant seized a large amount of evidence – especially pictures – but everything was suppressed.

When reviewing a search warrant, ask the following:

- Who gave you the information?
- Why are they reliable?
- How did they get the information?
- Why is evidence at that location?

CONCLUSION

The biggest challenge to any search warrant is probable cause. Many of the affidavits discussed in this class were dismissed because of lack of probable cause.

Learning from the mistakes of others, using examples to learn what probable cause is, will go a long way to making sure that our affidavits and warrants are done correctly.

