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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 4 2000
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA

Appellant,

v.

THOMAS EMERSON,

Appellee.

No. SR-99-908

RECEIVED

APR 5 2000

**FROM: COURT OF
CRIMINAL APPEALS**

ACCELERATED DOCKET ORDER

On April 19, 1999, the Honorable Charles Tate, Special Judge, Carter County District Court, suppressed evidence seized by the State pursuant to a search warrant after finding the affidavit in support of the search warrant failed to meet the constitutional standard required for establishing probable cause. The State appealed the magistrate's ruling to the District Court under 22 O.S. 1991, § 1089.1. The Honorable John Scaggs, District Judge of Carter County, entered an order affirming the magistrate's ruling. The State appeals the District Court's order.

On appeal, the State raises one proposition of error:

The preliminary hearing magistrate erred in holding that the search warrant at issue in the case at bar was issued in violation of the Fourth Amendment of the United States Constitution and in suppressing the evidence seized as a result of the execution of such warrant, said suppression resulting in the dismissal of the Manufacture of Methamphetamine charge against the Defendant.

Pursuant to Rule 11.2(A)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1998), this appeal was automatically assigned to the Accelerated Docket of this Court. The proposition of error was presented in oral argument January 20, 2000, pursuant to Rule 11.2(F). At the conclusion of oral argument, the Court took this matter under advisement.

In *Langham v. State*, 1990 OK CR 9, 787 P.2d 1279, this Court abandoned the *Aguilar-Spinelli* analysis for determining whether probable cause exists to

believe contraband or evidence is located in a particular place.¹ In its place, we adopted the "totality of the circumstances" analysis as announced by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527. Following the rationale of the Supreme Court in *Gates*, we stated the task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. In other words, for probable cause to exist, the issuing magistrate must have some basis for determining there is a fair probability the **circumstances and/or information** contained in the affidavit is true.

In *Langham*, this Court upheld the magistrate's finding of probable cause. In so holding, we found the magistrate had a sufficient basis for determining a fair probability the **circumstances and/or information** supplied by the informant in affidavit was true. Initially, a controlled buy had already been made from the location to be searched.² Secondly, the affidavit contained the length of time the detective had known the informant and the past performance and reliability of that informant. Thus, the magistrate had two independent basis for concluding there was fair probability the information supplied by the informant was true: 1) independent corroboration by the police of some part of the information supplied by the informant,³ and 2) the past performance and

¹ The two-pronged test derived from the United States Supreme Court's decisions in *Aguilar v. Texas*, 378 U.S.108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723(1964) and *Spinelli v. United States*, 393 U.S. 410, 416, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) was whether the affidavit in support of a request for a search warrant contained underlying circumstances indicating the informant was credible, or that the informant's information was reliable.

² In *Gates*, the Supreme Court recognized that because an informant is right about some things, s/he is more probably right about other things. 462 U.S. at 244.

³ This Court has previously recognized the importance of independent corroboration by the

reliability of the informant.⁴

The facts of the case at bar differ greatly from the facts in *Langham*. While the information provided by the confidential informant in this case is admittedly detailed, there is no evidence in the affidavit that independent corroboration of any part of that information had been made by law enforcement personnel before the request was made for a search warrant. In addition, there is no information regarding the veracity or reliability of the confidential informant, which is no longer necessary in and of itself, if there is some pre-warrant corroboration.⁵ Thus, the only information provided the magistrate was unverified, unsubstantiated hearsay.⁶ As such, there was no basis for the issuing magistrate to have found there was a fair probability the ***circumstances and/or information*** contained in affidavit was true.

IT IS THEREFORE THE ORDER OF THIS COURT, by a vote of 4 - 1, that the order of the District Court of Carter County in Case No. CF-98-622, is **AFFIRMED**.

IT IS SO ORDERED.

State as establishing probable cause to support a request for a search warrant. See *Gregg v. State*, 1992 OK CR 82, 844 P.2d 867 (The Court recognized the officer/affiant had gone to great lengths to investigate the allegations made by S.S. and the affidavit contained information from various sources tending to corroborate S.S.'s statement); *Bryan v. Stuart*, 1997 OK CR 15, 855 P.2d 1070 (The Court observed independent corroboration supported the information contained within the affidavit); and *Mollett v. State*, 1997 OK CR 28, 939 P.2d 1 (The Court affirmed the magistrate's finding of probable cause in part due to corroboration by the OSBI criminalist.)

⁴ In *Gates*, the Supreme Court acknowledged an informant's "veracity," "reliability," and "basis of knowledge" are all highly relevant in determining the **value of his report**. (emphasis added).

⁵ See *U.S. v. Richardson*, 86 F.3d 1537 (10th Cir. 1996) where the court observed that under *Gates*, there is no need for a declaration of the reliability of an informant when the informant's information is corroborated by other information. See also, *U.S. v. Hager*, 969 F.2d 883 (10th Cir. 1992) where the court noted the informant's reliability was demonstrated by the accuracy of many of the details provided which were independently corroborated by law enforcement authorities.

⁶ In *Gates*, the Supreme Court recognized it is enough, for purposes of assessing probable cause, that corroboration through other sources of information reduces "the chances of a reckless or prevaricating tale," thus providing a substantial basis for crediting the hearsay. 462 U.S. at 245.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 4 day
of April, 2000.



RETA M. STRUBHAR, Presiding Judge



GARY L. LUMPKIN, Vice Presiding Judge



CHARLES A. JOHNSON, Judge



CHARLES S. CHAPEL, Judge



STEVE LILE, Judge

Writing Attached.

ATTEST:



Clerk

JOHNSON, JUDGE: SPECIAL CONCUR

I am writing specially in response to Judge Lile's dissent in this matter. First, I have read his dissent thoroughly and the cases that are cited therein. I agree with not only the citations, but all of the quotes as it relates to those cases. On the other hand, there are a couple of matters that need to be pointed out as it relates to this Order.

It should first be noted that in this particular case the confidential informant was totally unknown to the police officers. Judge Lile, in addressing *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, and *Langham v. State*, (opinion, Judge Johnson) 1990 OK CR 9, 787 P.2d. 1279, admits that corroboration of the informant's reliability by police corroboration and/or prior dealings with the informant, were important and were relied upon in both cases for the final results as to such opinions.

The key in this particular case is corroboration. Here, the officer relied totally upon a hearsay affidavit that was not corroborated in any particular. There also had been no prior dealings with the informant. The affidavit set forth in great detail the confidential informant's statements. It would have been very simple for the officer to have corroborated certain parts of the affidavit; this was not done.

In all of the cases that Judge Lile cites, there was corroboration to some extent. That is not the case here.

Judge Lile would modify *Langham* and would adopt a new test that is called "inherently probable" and a further test called "an admission against penal interest". The writer does not want to change the wording of *Langham* or *Gates*, and therefore, would specially concur in the Order herein.

LILE, JUDGE: DISSENTS

A search warrant was issued in this case based upon information related by a confidential informant to a police officer. The affidavit in support of probable cause fails to set forth any direct statement of the reliability of the informant.

In *Langham v. State*, 1990 OK CR 9, 787 P.2d 1279, this court adopted the "totality of the circumstances" test set forth by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317, reh. den. (US) 77 L.Ed.2d 1453, 104 S.Ct. 33. In *Gates*, the Supreme Court established the proper standard for determining probable cause for issuance of a warrant based on information provided by an informant. The Court said:

"The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

The Court further stated:

"And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for...concluding' that probable cause existed."

The above tests were adopted verbatim by this Court in *Langham*.

Under the facts of the *Gates* and *Langham* cases, corroboration of the informant's reliability by police corroboration of portions of the informant's disclosure and/or prior dealing with the informant were important and were relied upon in the final results in the cases. However in neither case were

these two forms of corroboration delineated as necessary or exclusive to justify issuance of the warrant.

In *Gates*, the court said: "...even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case."

The *Gates* Court further said of the issues of "veracity" or "reliability" and "basis of knowledge" that "they are better understood as relevant consideration...a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other..."

In the facts of this case, the basis of knowledge of the informant is so detailed and complete when she describes the efforts, in which she joined, over a three day period to gather the items necessary to manufacture and to in fact participate in the manufacture of methamphetamine that it is difficult to question that she speaks the truth.¹ It is not surprising that Judge Scaggs specifically stated:

¹ Affidavit for Search Warrant:

"2. That on today's date, October 20th, 1998, at 6:00 AM, I was contacted by Sergeant Gary Watson who advised that he was contacted at home by CI number CCSO 10-98-01. The CI reported to Watson that she had just left THOMAS EMERSON, JERRELL BRAY, LINDA FINLEY, SHERRY, and BUNNY at the Findly trailer on Finley road south of Myall road, south of Lone Grove, Carter County, Oklahoma. The CI reported that she had been at the trailer with the above mentioned people for the last two days. During the last two day there was a constant 'cook' going on of methamphetamine, a controlled and dangerous substance.

3. On Today's date, October 20th, 1998, at 7:00 AM, I arrived at the Carter County Sheriff's Department, Healdton Office, located at the Healdton, Oklahoma City Hall

building and met with Sergeant Watson and CI CCSO 10-98-01. The CI related the following details to me.

- A. On Sunday, October 18th, 1998 shortly after midnight the CI was driving her white Chevrolet Corsica 4 door and was stopped at the intersection of Highway 76 North and Highway 70 at the Carter County Sheriff's Department drivers license check point. The CI reported that she was very scared when she stopped because MIKE ISAACS had left 2 bags of red substance in her glove box that BRAY told the CI was RED PHOSPHORUS.
- B. On Sunday, October 18th, 1998 shortly after midnight, after leaving the check point, the CI picked up JERRELL BRAY in the CI's vehicle. JERRELL BRAY told the CI that he needed to go pick up some 'pills and stuff'. JERRELL BRAY further explained to the CI that he needed LITHIUM BATTERIES to manufacture methamphetamine. JERRELL BRAY drove the CI and JERRELL BRAY drove to Ardmore, Oklahoma where they stopped at the Walmart store and went inside. The CI watched JERRELL BRAY steal eighty (\$80) dollars in LITHIUM BATTERIES from the store. JERRELL BRAY and the CI then drove to Norman, Oklahoma to a Walmart store and went inside. The CI watched JERRELL BRAY steal ten (10) boxes of Equate pseudoephedrine tablets, 48 pills per box. JERRELL BRAY and the CI then drove to Carrollton, Texas to a Walmart store. JERRELL BRAY and the CI went inside the store and went to the pharmacy section. The store was sold out of pseudoephedrine tablets. JERRELL BRAY and the CI then left the store. JERRELL BRAY then drove the CI to a XXX movie theatre where they stayed approximately four (4) hours watching XXX movies. JERRELL BRAY and the CI drove back to the CI's residence in Healdton, Oklahoma, arriving shortly before 12 noon, October 18th, 1998.
- C. On Sunday October 18th, 1998 somewhere around 12 noon JERRELL BRAY and the CI left the CI's residence and drove to a single wide trailer located on Finley road south of Myall road approximately 2/10 miles on the west side of the road. Upon arriving at the trailer house the CI and JERRELL BRAY went inside. Inside the trailer house was THOMAS EMERSON, LINDA FINLEY, a female named SHERRY who lives with Linda Finley, Sherry was described as White Female approximately thirty-five (35) years old with blonde shoulder length hair, another female named BUNNY who was described as a white female approximately twenty-five (25) years old with blonde short curly hair and was with Thomas Emerson. Approximately one (1) hour after arriving at the trailer house EMERSON, BRAY, and SHERRY began to "cook" methamphetamine, a controlled and dangerous substance. BRAY and EMERSON told the CI and BUNNY that they could not leave the trailer. The CI observed hoses, glassware, a microwave oven, a camp cooking stove, bottles of unknown gasses, coffee filters, plastic bottles with hoses coming out of them, bags of powder substance, jars of yellowish liquid, coleman camping fuel, other bottles and cans of thinners, cans or ether starting, plastic baggies, other glass containers of milky multi layer substances. The CI observed BRAY and EMERSON carry jars of white powder substance that the CI was told was 'settled out' ephedrine. EMERSON and BRAY carried these jars of powder substance out the back door to the south of the trailer and buried them behind the trailer. The CI observed BRAY and SHERRY taking apart a power transformer. They were using a hack saw to cut the transformer open. BRAY told the CI that there was LITHIUM inside the transformer and they used the LITHIUM to manufacture methamphetamine, a controlled and dangerous substance. The CI saw BRAY and SHERRY pouring a yellowish liquid into glass Pyrex calker and put it in the microwave. The CI watched EMERSON turn on a gas valve that was connected to tubing running to the rear of the trailer home.

"This court does find, however, that it would have issued a search warrant itself based upon the factual allegations present in the affidavit for search warrant as the information contained therein from the confidential informant rang 'inherently true' and established probable cause in this Court's mind to believe that contraband was present at the Parker (Finley) residence."

The "basis of knowledge" in this case is so strong that it cures any perceived deficiency concerning reliability.

The methods of establishing reliability mentioned in *Gates* are not exclusive.

In *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723,

EMERSON told the CI that he was 'GASSING IT'. The CI reported that when EMERSON would turn on the gas she would hear a 'hissing' type sound and would smell a very strong odor of ammonia and that it would get very cold very quickly inside the mobile home. The CI saw BRAY carry baggies of what she was told was 'finished product', Lithium Batteries, and containers of ephedrine outside behind the mobile home to the south and bury them. The CI saw EMERSON carry several large black trash bags full of trash from the area they were 'cooking' in outside the back door of the mobile home to the South. EMERSON told the CI that he was fixing to do thirty-five (35) years on some kind of a 'gun deal' so he was going to make some 'big cooks' and go to Mexico. BRAY told the CI that after these 'big cooks' he was also going to flee the state and go to New Orleans, LA. BRAY asked the CI to leave with him.

D. On Monday, October 19th, 1998 at 7:00 PM BRAY and CI left the mobile home to go to MIKE ISAACS residence in Wilson, Oklahoma. BRAY told the CI that they needed to pick up a propane bottle full of 'gas'. Upon arrival at ISAACS residence BRAY talked to ISAACS father who told BRAY ISAACS wasn't home. BRAY attempted to get the bottle and ISAACS father would not allow BRAY to get it. The CI has a history of seizures and had a seizure while at ISAACS residence. BRAY then drove the CI home where she stayed and slept until 4:30 AM October 20th, 1998. Upon waking up the CI immediately reported these facts to Sergeant Watson and Lieutenant Sturges.

4. The items described by the CI in the mobile home are consistent with the manufacturing of methamphetamine. The 2 liter plastic bottle with the plastic hoses attached are consistent with a hydrogen chloride gas generator and that the hot plates and microwave oven are consistent with medium temperatured heat sources which are used for the unlawful manufacture of methamphetamine. The gas described is consistent with Anhydrous Ammonia which is used for the unlawful manufacture of methamphetamine. Further the Coleman fluid, paint thinners and coffee filters are also consistent with the washing or cleaning of the methamphetamine in the final stages of the manufacturing of methamphetamine."

it is said:

“Quite apart from the affiant's own knowledge of respondent's activities, there was an additional reason for crediting the informant's tip. Here the warrant's affidavit recited extrajudicial statements of a declarant, who feared for his life and safety if his identity was revealed, that over the past two years he had many times and recently purchased 'illicit whiskey.' These statements were against the informant's penal interest, for he thereby admitted major elements of an offense under the Internal Revenue Code. Section 5205(a) (2), Title 26, United States Code, proscribes the sale, purchase, or possession of unstamped liquor.

Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility--sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct. Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that property and furnished probable cause to search.”

In *United States v. Satterwhite*, 980 F.2d 317 (5th Cir. 1992), the 5th Circuit said:

“Cooks' statements are also reliable because he admitted that he had previously delivered cocaine to the apartment. This was an admission against penal interest because it implicated Cooks as a co-conspirator with Satterwhite. ‘Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility--sufficient at least to support a finding of probable cause to search.’ *United States v. Harris*, 403 U.S. 573, 583, 91 S.Ct. 2075, 2082, 29 L.Ed.2d 723 (1971); see *Spinelli*, 393 U.S. at 425, 89 S.Ct. at 593 (White, J., concurring) (‘[I]f ... the informer's hearsay comes from one of the actors in the crime in the nature of an admission against interest, the affidavit giving this information should be held sufficient.’); *United States v. Angulo-Lopez*, 791 F.2d

1394, 1397 (9th Cir. 1986) ("When the circumstances suggest veracity, such as an admission against penal interest, a statement made to an informant can be considered reliable.")"

Likewise, the 9th Circuit has said in *United States v. Estrada*, 733 F.2d 683 (9th Cir. 1984), cert. den. 469 U.S. 850, 104 S.Ct. 168, 83 L.Ed.2d 103:

"Under *Gates*, the informant's 'veracity', 'reliability', and 'basis of knowledge' are weighed together with any other evidence that supports the finding of probable cause. They are viewed cumulatively, not as independent links in a chain. See *Landis*, supra, 726 F.2d at 541.

The affidavit contained abundant evidence of the basis of 'X's knowledge. 'X' admitted to extensive involvement in the criminal scheme with appellants and based his statements on personal knowledge and observation. 'X' stated that he saw Gorman 'cook' a quantity of PCP in Ernest Estrada's residence the night before the search warrant was obtained. These observations satisfy the first prong of the Aguilar-Spinelli test. See *Tahuna*, 702 F.2d at 1284.

The affidavit also satisfies the 'credibility' and 'reliability' prong of the Aguilar-Spinelli test. 'A detailed eye-witness report of a crime is self-corroborating; it supplies its own indicia of reliability.' *United States v. Banks*, 539 F.2d 14, 17 (9th Cir.), cert. denied, 429 U.S. 1024, 97 S.Ct. 644, 50 L.Ed.2d 626 (1976).

'X's reliability was also tested by the many corroborating details that he supplied to the police. In particular, his description of the time and manner that the transaction at the 'Science Shop' would take place indicated his detailed knowledge of the appellants' affairs. Finally, 'X's statements about past and present involvement in the manufacture of PCP with appellants constituted admissions against his penal interest. 'Admissions of crimes ... carry their own indicia of credibility--sufficient at least to support a finding of probable cause to search.' *United States v. Harris*, 403 U.S. 573, 583, 91 S.Ct. 2075, 2082, 29 L.Ed.2d 723 (1971); *Tahuna*, 702 F.2d at 1284."

This court should recognize that an "inherently probable" statement as well as "an admission against penal interest" are proper considerations under *Gates* and *Langham*.