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Constitutional Law - Search and Seizure - Sufficiency of Complaint to Support a Search Warrant - Probable Cause - Whitely v. State

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CONSTITUTIONAL LAW—Search and Seizure—Sufficiency of Complaint to Support a Search Warrant—Probable Cause. Whitely v. State, 418 P.2d 164 (Wyo. 1966).

On the morning of November 24, 1964, proprietors of a number of business establishments in the little city of Saratoga, Wyoming, discovered that their stores had been broken into. The dutiful sheriff of Carbon County took a brief trip to the scene of the break-ins that same morning to make an investigation. He turned up no significant clues concerning the identity of the burglars.[1] On his return to Rawlins, he appeared before a justice of the peace to swear out a complaint from which the following excerpt is taken:

> I, C. W. Ogburn, do solemnly swear that on or about the 23 day of November, A. D. 1964, in the County of Carbon and State of Wyoming, the said Harold Whiteley and Jack Daley, defendants did then and there unlawfully break and enter a locked and sealed building . . . contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Wyoming.

It is to be noted that the above is the entire substance of the affidavit, no other facts or circumstances being given except for the location of the building. Upon the authority of this complaint, a warrant was issued for the arrest of Whiteley and Daley. The sheriff put out a state item through the Casper patrol office calling for the arrest of the two suspects. Modern communications soon spread the call to Laramie, where an alert patrolman spotted the wanted men as they were about to enter the Buckhorn Bar. Proceeding on the authority of the radio alert, the officer arrested the two men. Then, acting together with other members of the Laramie police and the Albany County Sheriff's office, he conducted a search of the suspects' car, there to descry the booty, consisting of some old coins which had been collected by one of the victimized businessmen, which it was alleged had been taken from the establishments in Saratoga. The suspects were taken to Rawlins, where a new complaint was sworn out (identical to the first except as to date) and another warrant was issued.

When Whiteley was brought to trial, the goods seized

1. This conclusion is substantiated by testimony given by Sheriff Ogburn at the trial, shown in the transcript at pp. 36-54.

together with the uncorroborated testimony of the accomplice were sufficient evidence to obtain a conviction. The court-appointed attorney who was defending Whiteley made mild objections to the introduction of the goods into evidence. His protests were overruled.

Whiteley took an appeal to the Supreme Court of the State of Wyoming, based upon four grounds, only one of which is relevant here.[2] That is, the ground that the trial court admitted into evidence certain items which were obtained by the police through an unlawful search of the defendant's automobile. He proceeded upon two alternative theories: first, that the arresting officer did not have sufficient information to make a lawful arrest; and second, that even if there was probable cause for arrest, the usual circumstances which justify an ancillary search were not present.[3] The court had no difficulty in disposing of this argument. The major premise is unquestionably sound, being that a peace officer may make an arrest without a warrant when he has reasonable or probable grounds to suspect that the person whom he is about to arrest has committed a felony. The court's minor premise can be adequately delineated only through a direct quotation.

> In this instance, the officer in the regular course of his employment as a police officer was advised by the usual dissemination from his superiors, which in turn came by broadcast radio, based upon the issuance of a warrant, that two burglars were sought. He knew defendant's companion. He had a description of the vehicle being driven. If he had not proceeded with the arrest he would have been in violation of his duty. It must be held that the arrest was reasonable and proper.[4]

Once the decision that the arrest was lawful was pronounced, there appeared no obstacle to a determination that a search made incident thereto, and reasonable under the circumstances, was all right; and that the fruits of that search were properly admitted by the trial court.

2. Whiteley v. State, 418 P.2d 164, 165 (Wyo. 1966).
3. "*i.e.*, (a) the arrested person is armed or might attempt to escape; (b) the arrested person might destroy evidence which is the fruit or implement of the crime for which he has been arrested; and (c) the protection of the arresting officer . . . ." *Id.* at 167.
4. *Ibid.*

The thesis of this essay is that the decision in *Whiteley v. State* was based upon an imprecise, superficial formulation of the sorites. A proper inquiry would have begun with a major premise stating that the legality of the arrest of Whiteley (and thus the validity of the search and seizure of the goods) would depend entirely upon the sufficiency of the complaint to support the warrant which was issued. The sufficiency of the complaint is in turn predicated upon a finding of probable cause made not by the police but rather in a neutral and detached manner by a magistrate. A brief excursion into the relevant portions of the law of arrest will serve to demonstrate these propositions.

First, the statute in Wyoming provides that when a written complaint is filed with a justice, then he shall issue a warrant for the arrest of the person accused if there appear to be reasonable grounds supporting the affiant's contention.[5] The annotation in the statute book directs our attention to *C. J. S.* for a few paragraphs about probable cause.[6] The magistrate, it is said, is to look for evidence solid enough to create a strong indication of guilt. He is not to be swayed by mere hearsay or suspicion. To quote, "there must be laid before the magistrate some legal evidence that a crime has been committed, and that the person charged has committed it."[7] Here is the criterion established for use in interpreting the statute in the State of Wyoming. As we proceed with our inquiry, we shall see that it is merely a distillation of the essence of the pronouncements made by numerous courts on this subject. The norm is that the magistrate must know of the reasons for the suspicion and must weight them impartially in arriving at his determination of probable cause.

From the transcript of the *Whiteley* trial, we are given all we know about the facts leading to the suspicion of Whiteley. The following quotation is taken from the direct examination of Sheriff Ogburn by the prosecution. The Sheriff has

5. WYO. STAT. § 7-160 (1957): "Whenever a complaint in writing and upon oath, signed by the complainant, shall be filed with the justice, charging any person with the commission of any offense, it shall be the duty of such justice to issue a warrant for the arrest of the person accused, if he shall have reasonable grounds to believe that the offense charged has been committed." *See also* WYO. STAT. §§ 7-411 and 7-412 (1957), providing necessary elements of a complaint together with a suggested form.

6. 22 C.J.S. *Criminal Law* § 320 (1961).

7. *Ibid.*

just told of going to Saratoga to look around at the scene of the crime.

> Q: After you had finished your investigation, what did you do?
> A: After we finished our investigation we come back to Rawlins, *and through a tip,* why, we put out an item, state item on two suspects of the robbery.
>
> Q: Who were the two suspects?
> A: Jack Daly and Mr. Harold Whiteley.[8] (emphasis supplied)

The totality of revealed circumstances indicating probable cause for the arrest of Whiteley was but a single tip, of unknown origin, of undisclosed nature. No attempt was made by the defense attorney to elicit more information upon cross-examination. No mention is made of this fact in the opinion of the Supreme Court of the State of Wyoming. We will return to a consideration of the legal significance of tips in a later paragraph. But the direct examination quoted above should be kept in mind during the intervening discussion.

Second, we have a great body of common law concerning the subject of probable cause, from which it will be necessary to consider but a few of the more important cases. Some of these cases deal with search warrants, some with warrants for arrest. In the words of the Supreme Court of the United States, "The language of the Fourth Amendment, that '. . . no Warrants shall issue, but upon probable cause . . .' of course applies to arrest as well as search warrants."[9] In the case of *Aguilar v. Texas,*[10] the Supreme Court notes that through the Fourteenth Amendment, the standards governing probable cause developed under the Fourth Amendment are made mandatory upon the states.

Giordenello v. United States[11] is directly in point. In that case, a complaint was sworn out by a narcotics agent, containing allegations that Giordenello was possessed of heroin in violation of a federal statute.[12] Upon that complaint, a

8. Transcript of the Whiteley trial, p. 40.
9. Giordenello v. United States, 357 U.S. 480, 485-86 (1958).
10. 378 U.S. 108, 110 (1963).
11. Giordenello v. United States, *supra* note 9.
12. The sworn complaint read, in part, "The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas

warrant was issued for his arrest. An arrest was made on authority of the warrant. A search incident to the arrest revealed heroin in possession of the defendant. Motions to suppress the use of the heroin as evidence were denied by the trial court. On appeal to the Supreme Court, defendant's primary theory was that the complaint was defective in that it recited no more than the elements of the crime charged. Upon that theory, the Court reversed the conviction. The constitutional protection of the Fourth Amendment, implemented in this instance by Rule 4 of the Federal Rules of Criminal Procedure, requires that a magistrate make a cool and impartial determination of probable cause before issuing a warrant. Because the complaint showed on its face nothing indicative of the source of the affiant's belief that the defendant had violated the law, the complaint was defective. Thus, the warrant issued upon its authority was invalid, which meant that the evidence seized in a search incident to arrest under the warrant was illegally obtained and should have been suppressed.

Similar statements were made in *United States v. Ventresca*.[13] There the Court indicated that probable cause cannot be shown by affidavits which are purely conclusory.[14] It is not sufficient for the affiant to state his belief that probable cause exists without giving details of the underlying grounds which form the basis for that belief.

The rationale for the position taken by the Court is clear. Public policy demands that citizens be free from arrest unless a clear case for their detention can be made. Perhaps the most

. . . Veto Giordenello did receive, conceal, etc., narcotic drugs . . . with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

"And the complainant further states that he believes that ———— ———— are material witnesses in relation to this charge." *Id.* at 481. The essential similarity of this complaint to that from the *Whiteley* case is obvious.

13. 380 U.S. 102, 108-09 (1965).

14. In *Ventresca*, the affidavit upon which the warrant was issued stated specifically the grounds for the belief of the affiant. It was described seven trips of a vehicle made to defendant's residence, carrying tin cans and sugar, and bringing away what appeared to be full cans. Investigators claimed to have smelled the odor of fermenting mash near the house. Sounds like those made by a pump were overheard. The court chose to sustain the validity of a search made upon a warrant issued upon this affidavit. But note the degree of particularity with which the affiant supported his conclusions. The affidavit is set forth in toto *Id.* at 112. A look at it would be rewarding in this context.

quoted statement of the policy of the Court is found in a dictum of Mr. Justice Jackson in *Johnson v. United States*:[15]

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprises of ferreting out crime.[16]

Commenting upon that dictum in the *Aguilar* case, Mr. Justice Goldberg said, "Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police."[17] It is entirely the business of an appellate court to inquire first into the basis of the magistrate's decision to allow a warrant to issue. This is properly where the Wyoming Supreme Court should have started its reasoning. The belief of the arresting officer is irrelevant to the real issue, which is, was the complaint sufficient to support a warrant for Whiteley's arrest. The law discussed in the paragraphs above indicates that it probably was not. The least that it indicates is that the sufficiency should have been considered by the court in its opinion.

The direct examination of Sheriff Ogburn showed that he had acted upon a tip. As we shall see below, a tip may be sufficient to show probable cause. But we must first consider the cautionary words of the Supreme Court in *Aguilar v. Texas*. The Court expresses a feeling that the conclusions of an informer are even more suspect than those of an officer. Whether such a statement can have much meaning is academic. Its thrust is sufficiently clear: mere conclusions, with no supporting facts, whether they be the decisions of an officer of the law or of an informant, with no statement implying personal knowledge and the source therefor, are totally insufficient to support a valid warrant. To quote from the Court's opinion, "The magistrate must be informed of some

15. 333 U.S. 10 (1948).
16. *Id.* at 13-14.
17. Aguilar v. Texas, *supra* note 10, at 111.

of the underlying circumstances from which the informant concluded that the norcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citing case] was 'credible' or his information 'reliable.' "[18]

The leading case on tips is *Draper v. United States*.[19] A hired informant, whose information had in the past experience of the narcotics agents been highly reliable, told an agent that Draper would be returning to Denver on a train on a certain day, dressed in a certain manner, carrying heroin. On this information, the agent awaited the train. When it arrived, the information in the description proved accurate. He therefore arrested Draper without a warrant, making a search which uncovered a supply of heroin in his pocket. Motions to suppress the evidence were denied by the trial court. Over the vigorous dissent of Mr. Justice Douglas, the Supreme Court sustained Draper's conviction on the theory that the narcotics agent had had probable cause to make the arrest. But notice that even here, the circumstances surrounding the tip were carefully scrutinized. The informant's accuracy in describing dress and mannerism were considered to indicate that the agent could rely upon his accuracy in the one further particular: possession of narcotics. But because there is no mention made of the nature of Sheriff Ogburn's tip in the *Whiteley* case, either on trial or in the Wyoming Supreme Court's opinion, we can assume only that it has not been considered.

From the above discussion of the law of probable cause and arrest, it is plain that the first question which should have been undertaken by the Wyoming Supreme Court was that of the sufficiency of the complaint. It seems clear from the record that the complaint was not sufficient in that it did not reveal the sources of the affiant's belief. The safeguard supposed to be present in the person of the neutral and detached magistrate was absent. All that was present was a bare skeleton of a conclusion, the body for which was predicated in a shroud of secrecy. Because the complaint was insufficient, the warrant was not valid; thus, the ensuing ar-

18. *Id.* at 114.
19. 358 U.S. 307 (1959).

rest under that warrant was unlawful; and therefore, finally the evidence seized in the search conducted at the time of that arrest should properly have been suppressed.

The implications following logically from this opinion are serious. It now appears that a Chief of Police can avoid the prescriptions of the Fourth Amendment by the simple expedient of ordering one of his officers to make an arrest. If the end of the proper inquiry is to discover whether or not the officer obeyed his orders, then the Fourth Amendment is effectively isolated from participation in Wyoming arrests. But this is not to suggest that the Supreme Court of the State of Wyoming had this in mind while it was considering its opinion in the *Whiteley* case. What appears is that the court had nothing in mind at the time except insuring the continued incarceration of an obviously guilty man. The lesson repeated by Mr. Justice Douglas in *Henry v. United States*[20] was perhaps forgotten. He said, "an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subjected to easy arrest."[21]

Perhaps on a proper brief submitted to show the state of the law as outlined above, the Wyoming Court will in some future hearing further enlighten us as to what it means to do about the Fourth Amendment.

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20. 361 U.S. 98 (1959).
21. *Id.* at 104.