

Defendant challenges that the legal sufficiency of the issuance of the search warrant, the affidavit upon which said issuance was based, the execution of the warrant, and the return of said warrant.

The affidavit is insufficient and is based upon hearsay and the affiant had insufficient personal knowledge of the facts to justify issuance of the search warrant and there is insufficient probable cause for issuance of the warrant.

"In *Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978), the Supreme Court held that an affidavit supporting a factually sufficient search warrant may be attacked upon allegations that the affidavit contained deliberate falsehoods or reckless disregard for the truth." *Wackerly*, 2000 OK CR 15, ¶ 13, 12 P.3d at 9. However, if when the inaccuracies are removed from consideration there remains in the affidavit sufficient allegations to support a finding of probable cause, the inaccuracies are irrelevant. *Id.* "To determine this issue, we ask whether the warrant would have been issued if the judge had been given accurate information." *Gregg v. State*, 1992 OK CR 82, ¶ 19, 844 P.2d 867, 875, citing *United States v. Page*, 808 F.2d 723, 729 (10th Cir.), cert. denied, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 683 (1987).

Under "totality of the circumstances," it is required that there be a substantial basis for concluding that probable cause existed. See *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (The standard for review for the validity of a search warrant is the totality of circumstances). See also *Lynch v. State*, 1995 OK CR 65, ¶ 18, 909 P.2d 800, 804-05. The Oklahoma court has

embraced the so called "totality of the circumstances" test enunciated in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), for state as well as federal constitutional claims. *Langham v. State*, 787 P.2d 1279, 1281 (Okl.Cr. 1990).

Search and arrest warrants must be based upon reliable evidence; thus, government agents should assert that the witness interviewed is believed to be reliable. The Supreme Court has noted that "an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report." *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

While an informant's *veracity, reliability and basis of knowledge* are still highly relevant, they are no longer separate and independent requirements to be met. These factors are closely intertwined issues to consider in determining probable cause. A deficiency in *one prong* may be compensated for by a strong showing as to the others in determining the overall reliability of hearsay information. *Corroboration* of the details of an informant's tip by independent police work is of significant value. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983).

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In *Fletcher v. State*, 735 P.2d 1190 (Okla. Cr. 1986), it was held that the issuance of two identical search warrants for different locations negated the reliability of the informant.

Franks v. Delaware, 438 U.S. 154 (1978), stated that the Court must look to the “four corners” of the affidavit to determine whether probable cause exists. Courts have defined probable cause as to “when known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that the offense has been committed or is being committed.” *United States v. Davis*, 458 F.2d 819 (D.C. Cir. 1972). The officer requesting the warrant must submit to the court an affidavit containing sufficient facts and circumstances to enable the Judge to make an independent evaluation of probable cause. *United States v. Ventresca*, 380 U.S. 102 (1962).

“An affidavit must provide the magistrate with substantial basis for determining the existence of probable cause, and a wholly conclusory statement fails to meet this requirement. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusion of others.” *Illinois v. Gates*, 462 U.S. 213, 239 (1983).

“An affidavit that states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge, is a bare bones affidavit. As we are aware that affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation, we

remain cautious not to interpret the language of affidavits in hyper-technical manner. Nevertheless, it is imperative that affidavits accurately reflect the facts of the particular situation at hand. The use of general boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct endangers the risk that insufficient particularized facts about the case or the suspect will be presented for the magistrate to determine probable cause. “ *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996). In applying its totality of the circumstances test, the Gates court identified three factors in determining whether probable cause existed: (1) the basis of the informant’s knowledge; (2) the reliability of the informant; and (3) the corroborative evidence presented by the government. *United States v. Shamaeizadeh*, 80 F.3d 1131, 1137 (6th Cir. 1996).

The Oklahoma Court of Criminal Appeals has previously ruled that, “When officers seek a search warrant based on information from a confidential informant, it is **required** that they be able to say when the **informant obtained the information.**” *Morris v. State*, 617 P.2d 252 (Ok.Cr.App. 1980)(emphasis added).

“Generally, search warrant must be so particularly describe the place to be searched that the officer can find the place without the aid of any other information save that contained in the warrant.” *McCormick v. State*, 388 P.2d 873, 875 (Okla. Crim. App. 1964). The *McCormick* court cited several prior cases in adhering to this principle. That principle was also followed in *Anderson v. State*, 657 P.2d 659, 661 (Okla. Crim. App. 1983). The court in that case acknowledged that the officer who prepared the warrant knew what property he was attempting to describe, but

held that this knowledge was insufficient because the property description should enable any officer to find the property, including an officer with no prior knowledge. *Accord Harvey v. State*, 676 P.2d 865 (Okla. Crim. App. 1984).

Retired DEA special agent, Dennis Fitzgerald, author of *The Informant Law Deskbook* (West 1997), therein stated:

“Many police managers view informants as a necessary evil, (1) time bombs waiting for the wrong moment to explode. The catastrophe that follows their detonation may include the death or serious injury of citizens,(2) civil law suits and destroyed police careers.(3) The Drug Enforcement Administration (DEA) reports that the "failure in the management of cooperating individuals constitutes, perhaps, the **most obvious single cause of serious integrity problems** in DEA and other law enforcement agencies."(4);” (emphasis added)

Sources for above: (1) Confidential Informants - Concepts and Issues Paper, International Association of Chiefs of Police, Law Enforcement Policy Center; (2) *Carlson v. United States*, 93-953G, see also Alvord, Snitches, Licensed to Lie?, San Diego Union Tribune, May 30, 1995, at A-7; (3) *Commonwealth v. Lewin*, 405 Mass. 566, 542 N.E. 2d 837 F.2d 727, 731 (6th Cir. 1988); (4) Integrity Assurance Notes, Drug Enforcement Administration, Planning and Inspection Division, Vol. 1, No. 1 (Aug. 1991). See also *United States v. Gardner*, 658 F. Supp. 1573, 1575 (W.D. Pa. 1987). See Dennis Fitzgerald’s article: <http://www.nacdl.org/CHAMPION/ARTICLES/98mayo3.html>

The United States Supreme Court interpretations of the United States Constitution do not bind the individual state's power to mold **higher standards** under their respective state constitutions. See *Cooper v. California*, 386 U.S. 58, 62 (1967). The United States Supreme Court, through both majority and dissenting opinions, has explicitly extended invitations to the states to adopt different rules should they deem it appropriate. See *Iowa v. Tovar*, 541 U.S. 77, 94 (2004); *Nichols v. United States*, 511 U.S. 738, 748 n.12 (1994). (“[A] State is free as a

matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.") (emphasis in original); *Lego v. Twomey*, 404 U.S. 477, 489 (1972) ("Of course, **the States are free, pursuant to their own law, to adopt a higher standard.** They may indeed differ as to the appropriate resolution of the values they find at stake."); *Cooper*, 386 U.S. at 62 ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

The court should be aware of the agreed to settlement of **\$6,000,000.00 (million)** dollars civil judgment granted against the government in Tulia, Texas, involving the false informant related activities and the over 28 people falsely charged. (Money has a way of getting people's attention). Officer of the year in Texas, a "gypsy" *traveling* law enforcement officer, Tom Coleman, received an award during his activities. There was no corroboration for his arrests and some defendants were able to prove alibis such as being at work during the time he said he made buys. Says he made notes on his arms. In the Tulia case, the majority of defendants were minority Americans and many faced with many years in prison if they fought the case, accepted plea bargains. Subsequently, most convictions were set aside.

Some statistics allege that "false informant" information is a major cause of false convictions in drug cases.

Also, there is the case of Kathryn Johnson, the 92 year old lady in Atlanta, Georgia, who was shot six times by police officers who broke into her home (she had anti-burglar bars and she came up shooting trying to protect herself) based upon a false affidavit for a search warrant that was subsequently determined to be a false affidavit and the alleged informant claimed he never gave the officers the false information. Subsequently, **two police officers plead guilty** to perjury type related charges involving the false affidavit.

There are other cases, multiple cases, involving false affidavits. Recently, during a jury trial in California, the Jury found the defendant not guilty when the informant testified and fell asleep on the stand several times. The jury found the informant not credible. The informant a drug addict in that case was paid several thousands of dollars. **Putting a known drug addict or criminal on the pay roll whether by way of a reduced sentence or money is always a questionable practice and leads to questionable cases.**

Suggested reforms include the requirement of corroboration for any informant cases and the requirement of an “in camera” review of the “informant” file concerning informant credibility and corroboration. Keep in mind, that informant credibility alone, is not the sole factor. In the Tulia, Texas, case the under-cover police officer information subsequently proved to be faulty and in the Kathryn Johnson case, the officer’s plead guilty to perjury related charges for falsifying affidavits.

A tip received by Crime Stoppers and forwarded to law enforcement must adhere to the standard requirements for search warrants based on information from an unnamed informant. *People v Keller*, ___ Mich App ___, ___ (2006). Where police were unable to establish the anonymous informant’s credibility and where information gathered from surveillance and a **trash pull** did not show that the information from the tipster was reliable, the affidavit was insufficient to establish probable cause and a search warrant should not have been issued. *Keller*, supra at ___.

In *State v. Litchfield*, 824 N.E.2d 364, the Indiana Supreme Court changed Indiana’s constitutional jurisprudence, holding in relevant part that “a requirement of articulable individualized suspicion, essentially the same as is required for a ‘Terry stop’ of an automobile,” imposes the appropriate constitutional standard in **trash searches**. *Litchfield*, 824 N.E.2d at 364.

We must conclude that “the tip in this case was completely lacking in indicia of reliability and the record offers no evidence that the confidential informant was reliable; the tip was, therefore, inadequate to support an investigatory stop.” *Id.* at 119. Thus, Detective Earley’s rationale for searching Belvedere’s trash did not rise to the level of an “articulable individualized suspicion, essentially the same as is required for a ‘Terry stop’ of an automobile.” *See Litchfield*, 824 N.E.2d at 364.

Defendant requests that there be sufficient “corroboration” for any informant testimony and that the court conduct an “in camera” review of the informant file concerning the informant reliability and corroboration.

WHEREFOR, Defendant prays that the court suppress the search and any evidence arising out of the search and dismiss this case.

Respectfully submitted,

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VERIFICATION

STATE OF OKLAHOMA)
COUNTY OF TULSA) ss.

Glen R. Graham, upon oath duly sworn do hereby state that I have read the above and foregoing motions and arguments and briefs and authorities and the matters stated therein are true and correct to the best of my information.

GLEN R. GRAHAM

Subscribed and sworn to before the undersigned notary public on the ____ day of _____, 20__.

My commission expires: _____
Notary Public

CERTIFICATE OF SERVICE

This certifies that the undersigned hand delivered a true and correct copy of the above instrument to the office of the Tulsa County District Attorney, 9th Floor, Tulsa County Court House, 500 S. Denver Ave., Tulsa, Oklahoma, on the ____ day of _____, 20__.

By: _____
Glen R. Graham