SIGNING THE OCCASIONAL SEARCH WARRANT

(WITH A CHECKLIST)

Tennessee Judicial Academy
Tuesday, August 20, 2013
Judge Chris Craft
Criminal Court Division VIII
30th Judicial District at Memphis

SEARCH WARRANT CHECKLIST

1. DO NOT DISCUSS THE FACTS WITH THE OFFICER BEFORE REVIEWING THE AFFIDAVIT (you can discuss why it was rejected, but shouldn't help the officer re-draw it). [p. 6]

2. IF YOU REJECT THE AFFIDAVIT/WARRANT, DON'T GIVE IT BACK UNLESS YOU WRITE "REJECTED" ON IT (to keep it from being taken to another judge). [p. 7]

3. MAKE SURE THE OFFICER DOES NOT SIGN THE AFFIDAVIT UNTIL SWORN. (suggested oath: "Do you solemnly swear that this affidavit is true to the best of your knowledge, information and belief?") [p.7]

4. MAKE SURE THE AFFIDAVIT PARTICULARLY DESCRIBES THE CONTRABAND OR EVIDENCE TO BE SEIZED. [p. 8]

5. MAKE SURE THE PERSON, PROPERTY OR PLACE TO BE SEARCHED IS SUFFICIENTLY DESCRIBED IN THE WARRANT (or in the affidavit, if it is incorporated in the warrant by reference or is mentioned by the warrant). **[p. 8]**

6. MAKE SURE THE INFORMATION IN THE AFFIDAVIT IS NOT TOO "STALE" (lapse of time may negate probable cause)**. [p. 9]**

7. MAKE SURE THE AFFIDAVIT, IF BASED ON HEARSAY, SETS OUT THE INFORMANT'S 1) BASIS OF KNOWLEDGE AND 2) CREDIBILITY [p. 10]

8. IF BASED ON THE STATEMENT OF A CRIMINAL INFORMANT, MAKE SURE THE AFFIDAVIT SETS OUT (1) THE BASIS FOR THE INFORMANT'S KNOWLEDGE, AND EITHER (2)(A) A BASIS ESTABLISHING THE INFORMANT'S CREDIBILITY OR (2)(B) A BASIS ESTABLISHING THAT THE INFORMANT'S INFORMATION IS RELIABLE. [p. 11]

9. WHEN SIGNING THE WARRANT, WRITE ON IT THE DATE AND TIME, AND THE NAME OF THE OFFICER TO WHOM DELIVERING THE WARRANT. [p. 12]

10. GIVE THE ORIGINAL AND ONE EXACT COPY TO THE OFFICER, AND KEEP ONE EXACT COPY UNTIL RETURN IS MADE. [p. 12]

11. REMIND THE OFFICER TO EXECUTE THE WARRANT WITHIN 5 DAYS, AND LEAVE YOUR COPY OUT UNTIL THE RETURN IS MADE, AS A REMINDER TO CALL THE OFFICER IF NO RETURN MADE PROMPTLY. [p. 13]

12. WHEN YOU SIGN AND DATE THE RETURN, MAKE SURE THE OFFICER HAS SIGNED IT FIRST, AND THAT THE ORIGINAL WARRANT IS FILED WITH YOUR COURT CLERK'S OFFICE. [p. 14]

13. FILE YOUR EXACT COPY OF THE WARRANT IN YOUR PERMANENT FILES. [p. 14]

APPLICABLE AMENDMENTS, RULES AND STATUTES

UNITED STATES CONSTITUTION, 4TH AMENDMENT

Unreasonable searches and seizures. - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TENNESSEE CONSTITUTION, ARTICLE 1, SECTION 7

Unreasonable searches and seizures - General warrants. - That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

TENN. R. CRIM. P. 41. – SEARCH AND SEIZURE

(a) Authority to Issue Warrant. — **A magistrate with jurisdiction in the county where the property sought is located may issue a search warrant** authorized by this rule. The district attorney general, assistant district attorney general, criminal investigator, or any other law-enforcement officer may request a search warrant.

(b) Persons or Property Subject to Seizure by Warrant. — A magistrate may issue a warrant under this rule to search for and seize any of the following:

(1) **evidence of a crime**;

(2) **contraband, the fruits of crime, or items otherwise criminally possessed**;

(3) **property designed or intended for use, or that has been used in a crime**;

(4) **a person whose arrest is supported by probable cause**; or

(5) **a person who is unlawfully restrained**.

(c) Issuance and Content of Warrant. —

(1) Issuance. — **A warrant shall issue only on an affidavit or affidavits that are sworn before the magistrate** and establish the grounds for issuing the warrant.

(2) Content. — If the magistrate is satisfied that there is probable cause to believe that grounds for the application exist, the magistrate shall issue a warrant as follows:

(A) **The warrant shall**, as the case may be, **identify the property or place to be searched**, or **name or describe the person to be searched**; the warrant also shall **name or describe the property or person to be seized**.

(B) The search warrant shall command the law enforcement officer to search promptly the person or place named and to seize the specified property or person.

(C) **The search warrant shall be directed to and served by**:

(i) **the sheriff or any deputy sheriff of the county where the warrant is issued**; or

(ii) **any constable or any other law enforcement officer with authority in the county**.

(D) **The magistrate shall endorse on the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution**.

(3) Hearsay. — The magistrate may base a finding of probable cause on hearsay evidence in whole or in part.

(d) Copies and Record of Warrant. — **The magistrate shall prepare an original and two exact copies of each search warrant. The magistrate shall keep one copy as a part of his or her official records**. The other copy shall be left with the person or persons on whom the search warrant is served. The exact copy of the search warrant and the endorsement are admissible evidence.

(e) Procedures to Execute Warrant. —

(1) Who May Execute. — **The search warrant may only be executed by the law enforcement officer, or one of them, to whom it is directed**. Other persons may aid such officer at the officer's request, but **the officer must be present and participate in the execution**.

(2) Authority for Forcible Entry. — **If, after notice of his or her authority and purpose**, a law enforcement officer is not granted admittance, or in the absence of anyone with authority to grant admittance, **the peace officer with a search warrant may break open any door or window** of a building or vehicle, or any part thereof, described to be searched in the warrant **to the extent that it is reasonably necessary to execute the warrant and does not unnecessarily damage the property**. [*See State v. Perry*, 178 S.W.3d 739, 744-46 (Tenn. Crim. App. 2005) concerning "no knock" warrants.]

(3) Timely Execution. — **The warrant must be executed within five days after its date**.

(4) Leaving Copy of Warrant and Receipt. — The officer executing the warrant shall:

(A) give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property; or

(B) shall leave the copy and receipt at a place from which the property was taken.

(f) Procedures After Execution of Warrant. —

(1) **Return and Inventory. — The officer executing the warrant shall promptly make a return, accompanied by a written inventory of any property taken**. Upon request, the magistrate shall cause to be delivered a copy of the return and the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(2) Documents to Court Clerk. — Unless the property is directed to be restored under these rules, **the magistrate shall transmit the executed original warrant with the officer's return and inventory to the clerk of the court having jurisdiction of the alleged offense in respect to which the search warrant was issued**.

(g) and (h) [OMITTED]

Tenn. Code Ann. §40-6-101. "Search warrant" defined.

A search warrant is an order in writing in the name of the state, signed by a magistrate, directed to the sheriff, any constable, or any peace officer of the county, commanding such sheriff, constable or peace officer to search for personal property, and bring it before the magistrate.

Tenn. Code Ann. § 40-6-102. Grounds for issuance.

A search warrant may be issued on any one (1) of the following grounds:

(1) Where the property was stolen or embezzled;

(2) Where the property was used as the means of committing a felony;

(3) Where the property is in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom the person may have delivered it, for the purpose of concealing it, or preventing its discovery; and

(4) Any other ground provided by law.

Tenn. Code Ann. § 40-6-103. Probable cause and affidavit.

A search warrant can only be issued on a probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched.

Tenn. Code Ann. § 40-6-104. Examination of complainant.

The magistrate, before issuing the warrant, shall examine on oath the complainant and any witness the complainant may produce, and take their affidavits in writing, and cause them to be subscribed by the persons making them. The affidavits must set forth facts tending to establish the grounds of the application, or probable cause for believing that they exist.

Tenn. Code Ann. § 40-6-105. Issuance of warrant.

The magistrate, if satisfied of the existence of the grounds of the application, or that there is probable ground to believe their existence, shall issue a search warrant signed by the magistrate, directed to the sheriff, any constable or any peace officer, commanding the sheriff, constable or peace officer forthwith to search the person or place named for the property specified, and to bring it before the magistrate.

Tenn. Code Ann. § 40-6-106. Form of warrant.

The warrant may be substantially in the following form:

State of Tennessee,
County of _____.
To the sheriff or any constable of the county:

Proof by affidavit having been made before me by A. B., that (stating the particular grounds of the application; or, if the affidavits are not positive, "that there is probable cause for believing that," stating the particular grounds of the application): You are therefore hereby commanded to make immediate search on the person of C. D. (or "in the house of E. F.," or "in the house situated," describing it, or any other place to be searched, with reasonable particularity, as the case may be), for the following property (describing it with reasonable particularity); and if you

find the same, or any part thereof, to bring it forthwith before me at (stating the place).
This _____ day of _____, 19____. L. M., Magistrate

[NOTE THAT THIS STATUTORY FORM OMITS A SPACE FOR THE HOUR AND MINUTE, AND SO SHOULD BE ALTERED IF USED]

Tenn. Code Ann. § 40-6-107. Return date.
(a) A search warrant shall be executed and returned to the magistrate by whom it was issued within five (5) days after its date, after which time, unless executed, it is void.
(b) All search warrants in this state may be executed either in the daytime or in the nighttime.

PROCEDURE FOR ISSUING WARRANT

1. DO NOT DISCUSS THE FACTS WITH THE OFFICER BEFORE REVIEWING THE AFFIDAVIT (you can discuss why it was rejected, but shouldn't help the officer re-draw it).

Courts reviewing the existence of probable cause to support issuance of a warrant may consider only the affidavit, and may not consider other evidence provided to or known by the issuing magistrate or possessed by the affiant. *State v. Jacumin*, 778 S.W.2d 430, 432 (Tenn. 1989); *State v. Henning*, 975 SW2d 290, 295 (Tenn. 1998). See also Tenn. Code Ann. § 40-6-104 (1997); Tenn. R. Crim. P. 41(c). Therefore, if you discuss the facts of the officer's investigation with the officer before you consider the warrant, you may decide there is probable cause to issue the warrant from the officer's oral presentation, when in fact some of that information has not been included in the affidavit, and is not sworn to.

Additionally, The Fourth Amendment warrant requirement mandates a probable cause determination made by a neutral and detached magistrate. *Jacumin* at 431, citing *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 396, 92 L. Ed. 436 (1948). Therefore, if you discuss the investigation of the case with the officer before considering the affidavit, your "neutral and detached magistrate" status may be compromised. If after rejecting the warrant, you help the officer redraw the affidavit, or otherwise advise the officer of other needed investigation, you are no longer acting in a neutral capacity. Once the officer learns from you the shortcomings of the affidavit, he or she is free to consult with a member of the District Attorney's or U.S. Attorney's office for legal advice. You don't want the officer testifying in court a few years down the road that "the Judge told me to draw it that way."

What is probable cause?

Probable cause is defined as "a reasonable ground for suspicion, supported by circumstances indicative of an illegal act."

The probable cause necessary for issuance of a search warrant must be based upon evidence appearing in a written and sworn affidavit. The affidavit must present facts upon which "a neutral and detached magistrate, reading the affidavit in a common sense and practical manner," can determine the existence of probable cause for the issuance of a search warrant. Furthermore, the affidavit must provide more information than just the affiant's conclusory allegations to ensure that the magistrate exercises independent judgment. In reviewing the existence of probable cause for issuance of a warrant, we may

consider only the affidavit and may not consider any other evidence known by the affiant or provided to or possessed by the issuing magistrate.

State v. Carter, 160 S.W.3d 526, 533 (Tenn. 2005).

2. IF YOU REJECT THE AFFIDAVIT/WARRANT, DON'T GIVE IT BACK UNLESS YOU WRITE "REJECTED" ON IT (to keep it from being taken to another judge).

Because warrant applications usually occur *ex parte*, the officer requesting the warrant is free to "forum shop" until finding a judge who will sign the warrant, regardless of its defects or lack of probable cause. You will have no way of knowing whether or not you are reviewing a warrant that has already been rejected. For this reason, it is a good practice to indicate on the instrument that it has been rejected, so the officer will have to return to his or her superior (or word processor) to obtain another one, unless it can be corrected on the scene by the officer.

3. MAKE SURE THE OFFICER DOES NOT SIGN THE AFFIDAVIT UNTIL SWORN. (suggested oath: "Do you solemnly swear that this affidavit is true to the best of your knowledge, information and belief?")

Inexperienced officers may bring you a warrant with the affidavit already signed, either by the officer or by another officer not present at the warrant request. You must either reject the warrant, have them prepare another affidavit, or have them re-sign after being sworn by you. Otherwise, the warrant will have been issued without a true affidavit, which is fatal in Tennessee. An affidavit is defined as "a statement in writing, signed, and made upon oath before an authorized magistrate." *Watt v. Carnes*, 51 Tenn. 532, 534 (1871), cited in *State v. Collins*, 978 S.W.2d 861, 869 (Tenn. 1998).

> The Fourth Amendment to the United States Constitution explicitly mandates that search warrants issue only "upon probable cause, supported by Oath or affirmation." Though, Article I, Section 7 of the Tennessee Constitution does not require an oath or affirmation, it precludes issuance of warrants except upon "evidence of the fact committed." Moreover, the General Assembly has expressly directed that a search warrant may be issued only upon a written and sworn affidavit which contains allegations establishing probable cause. Tenn. Code Ann. § 40-6-103 and -104 (1997 Repl.); Tenn. R. Crim. P. 41(c); *Jacumin*, 778 S.W.2d 430 at 432. Likewise, this Court previously has recognized that a written and sworn affidavit containing allegations from which the magistrate can determine whether probable cause exists is an indispensable prerequisite to the issuance of a search warrant in this State. *Id.*; see also *State ex rel. Blackburn v. Fox*, 200 Tenn. 227, 230, 292 S.W.2d 21, 23 (Tenn. 1956).
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> The law in this State is clear that a written and sworn affidavit is an essential prerequisite to the issuance of a valid search warrant."

Collins, 978 S.W.2d at 868-69 (Tenn. 1998). If the magistrate fails to sign the certificate on the affidavit stating that the witness was sworn, that fact itself is not fatal, as long as the affiant was sworn when the affidavit was signed. *Id*. at 869. The affidavit does not have to state the time the

affiant was sworn. *State v. Dellinger*, 79 S.W.3d 458, 471 (Tenn. 2002).

4. MAKE SURE THE AFFIDAVIT PARTICULARLY DESCRIBES THE CONTRABAND OR EVIDENCE TO BE SEIZED.

The Tennessee Constitution forbids general warrants, so the items authorized to be seized must be described with particularity, not generality.

> Under the Fourth Amendment a search warrant must contain a particular description of the items to be seized. Likewise, Article I, Section 7 of the Tennessee Constitution prohibits general warrants, and, in addition, Tenn. Code Ann. § 40-6-103 (1997 Repl.), specifically requires that search warrants describe the property to be seized with particularity.
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> The constitutional prohibition against general warrants is designed to limit governmental intrusion upon a citizen's privacy and property rights to only that shown to the magistrate to be necessary and to limit the discretion of the officer conducting the search. To satisfy the particularity requirement, a warrant "'must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.'" *State v. Meeks*, 867 S.W.2d 361, 367 (Tenn. Crim. App. 1993) (quoting *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981). However, as this Court stated in [*State v.*] *Lea*,
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> > Where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other. On the other hand, if the purpose be to seize not specified property, but any property of a specified character which, by reason of its character, and of the place where and the circumstances under which it may be found, if found at all, would be illicit, a description, save as to such character, place and circumstances, would be unnecessary, and ordinarily impossible.
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> 181 Tenn. at 382-83, 181 S.W.2d at 352-53.
>
> The warrant issued in this case authorized a search for "crack cocaine, illegal narcotics, pictures, records, ledgers, tapes or items that tend to memorialize [sic] drug sales and proceeds therefrom." In our view, the warrant describes the character of the property subject to seizure with sufficient particularity "to enable the searcher to reasonably ascertain and identify the things which are authorized to be seized." Accordingly, the warrant is not unconstitutionally general and the defendant's claim is without merit.

State v. Henning, 975 SW2d 290, 296 (Tenn. 1998)(most citations omitted). *See also State v. Reid*, 91 S.W.3d 247, 274-75 (Tenn. 2002).

5. MAKE SURE THE PERSON, PROPERTY OR PLACE TO BE SEARCHED IS SUFFICIENTLY DESCRIBED IN THE WARRANT (or in the affidavit, if incorporated in the warrant by reference or is mentioned by the warrant).

TENN. CONST. Art I, Section 7 prohibits general warrants, and T.C.A. 40-6-103

requires warrants to describe particularly the property and place to be searched. This requirement is met if the description particularly points to a definitely ascertainable place so as to exclude all others, and enables the officer to locate the place to be searched with reasonable certainty without leaving it to his discretion. Discrepancies between the warrant's description with regard to distances to the place to be searched and the actual distance to the building searched do not invalidate the warrant if this test is satisfied. *State v. Bostic*, 898 S.W.2d 242, 245 (Tenn. Crim. App. 1994). The degree of particularity is more relaxed with rural residences, rather than urban, because it is more difficult to describe addresses in the county. *Id.* at 245-6. The description does not have to be as specific as a deed to real property. *State v. Vanderford*, 980 S.W.2d 390, 405 (Tenn. Crim. App. 1997). A street address alone may be OK. *State v. McCary*, 119 S.W.3d 226, 247-48 (2003).

If the warrant specifically incorporates the affidavit, you can look at both to see if the description of the place or item to be seized is sufficient. If the affidavit is not referred to in the warrant, then you must only look to the warrant for a description. The warrant must "particularly describe the place to be searched," T.C.A. 40-6-103, and is satisfied if the description "particularly points to a definitely ascertainable place so as to exclude all others, and enables the officer to locate the place to be searched with reasonable certainty without leaving it to his discretion." *State v. Conatser*, 958 S.W.2d 357, 359-60 Tenn. Crim. App. 1997).

6. MAKE SURE THE INFORMATION IN THE AFFIDAVIT IS NOT TOO "STALE" (lapse of time may negate probable cause).

To establish probable cause, an affidavit "must set forth facts from which a reasonable conclusion may be drawn that the evidence will be found in the place to be searched pursuant to the warrant." Likewise, the affidavit "must contain information which will allow a magistrate to determine whether the facts are too stale to establish probable cause at the time issuance of the warrant is sought." *State v. Vann*, 976 S.W.2d 93, 105 (Tenn. 1998).

> Although the lapse of time between the occurrence of a crime and the issuance of a search warrant may affect the likelihood that incriminating evidence will be found, probable cause must be determined on a case by case basis. In making this decision, the issuing magistrate should consider whether the criminal activity under investigation was an isolated event or of a protracted and continuous nature, the nature of the property sought, and the opportunity those involved would have had to dispose of incriminating evidence.

State v. Conatser, 958 S.W.2d 357, 361 (Tenn. Crim. App. 1997). In *Conatser*, the affidavit in support of the warrant providing that the confidential informant had purchased drugs from the defendant "within the past 10 days" as well as numerous other times during the past 90 days or more was held sufficient, and not "too stale." When the illegal activity described is ongoing, courts have generally held that the affidavit does not become stale with the passage of time. However, *State v. Stepherson*, 15 S.W.3d 898, 902-03 (Ct. Crim. App. 1999), held that the information from an informant indicating drug activity on January 15 and February 19, 1997, did not alone provide a sufficient basis to establish probable cause for the possession of contraband

on the date of issuance of the warrant on April 16, 1997 (this "information alone was too "stale" to establish probable cause.") *See also State v. Curtis*, 964 S.W.2d 604, 616 (Tenn. Crim. App. 1997)("the affidavit failed to state probable cause for the issuance of the search warrant for Curtis's residence. The information contained in the affidavit was received eighteen months and six months prior to the execution of the affidavit. This information was stale.") *See also State v. Starks*, 658 S.W.2d 544, 546 (Tenn. Crim. App. 1983) (information received more than two months, standing alone, was stale and too remote to establish probable cause), but *see also State v. Reid*, 91 S.W.3d 247, 274-75 (Tenn 2002), in which guns were searched for three months after the murder, and the Court held that "where the object of the search is a weapon used in the crime or clothing worn at the time of the crime, the inference that the items are at the offender's residence is especially compelling, at least in those cases where the perpetrator is unaware that the victim has been able to identify him to the police."

7. MAKE SURE THE AFFIDAVIT, IF BASED ON HEARSAY, SETS OUT THE INFORMANT'S 1) BASIS OF KNOWLEDGE AND 2) CREDIBILITY

If the affidavit is based on the officer's own observations (i.e., he has seen, from the street, marijuana plants growing in the target's back yard) then only his basis of knowledge need be set out. "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *State v. Smotherman*, 201 S.W.3d 657, 663 (Tenn. 2006), citing United States v. Ventresca, 380 U.S. 102, 111, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965). However, if the affidavit is based on hearsay statements of an informant, a basis for the informant's credibility and reliability must be set out in the affidavit, as well as the informant's basis of knowledge.

> To ensure that the magistrate exercises independent judgment, the affidavit must contain more than mere conclusory allegations by the affiant. An affidavit may contain hearsay information and need not reflect the direct personal observations of the affiant. However, under the Tennessee Constitution, an affidavit containing hearsay information supplied by a confidential informant can not support a finding of probable cause unless it also contains factual information concerning the informant's basis of knowledge and credibility. While independent police corroboration can make up deficiencies in either prong, we have recognized that each prong represents an independently important consideration that must be separately considered and satisfied in some way.

State v. Henning, 975 S.W.2d 290, 295 (Tenn. 1998). Although a criminal informant's information is inherently suspect, information provided by an ordinary citizen is presumed to be reliable, and the affidavit need not establish that the source is credible or that the information is reliable. Information provided by a citizen-informant who is known to the affiant is presumptively reliable. *State v. Stevens*, 989 S.W.2d 290, 293 (Tenn. 1999) . The reliability of the information of a citizen-informant whose identity is not disclosed is to be determined from the circumstances and the affidavit in its entirety. *State v. Melson*, 638 S.W.2d 342, 356 (Tenn. 1982). If the information comes from an anonymous caller or citizen, the presumption of reliability does not apply. *State v. Carter*, 160 S.W.3d 526, 534 (Tenn. 2005).

In order for the informant to be considered a citizen informant, the affidavit should contain

> more than conclusionary allegations that the informant was a "concerned citizen source," "acted on civic duty," and "asked for no payment for their information." Generally, a more particularized showing of the law-abiding nature of the person supplying the information is needed. ... The reliability of the informant, as well as the information furnished, must be judged from all the circumstances and from the entirety of the affidavit. ... Even though the age of the informant is certainly relevant, the mere fact that the citizen was a juvenile, age 12, does not preclude a finding of reliability.

State v. Yeomans, 10 S.W.3d 293, 296 (Tenn. Crim. App. 1999).

Sometimes information used to obtain a search warrant may be provided by one who is neither a "citizen" or a "bystander" informant on one hand nor a "criminal" informant on the other. In *United States v. Phillips*, 727 F.2d 392 (5th Cir. 1984) , for instance, the affidavit in support of a search warrant was based on information from an estranged wife whose husband had threatened to shoot her. The court observed that, unlike "citizen informants," some informants may be involved with the defendant whose person or residence is to be searched and may "have personal reasons for giving shaded or otherwise inaccurate information to law enforcement officials . . . ." *Id*. at 397. The court emphasized that the wife "had recently quarreled with and left her husband" and that she did "not fit comfortably within the description of an 'eyewitness-bystander.'" *Id*. Although the court found that the information was not "presumptively reliable," it went on to conclude that probable cause had been established under a totality of circumstances analysis. *See State v. Williams*, 193 S.W.3d 502, 506-07 (Tenn. 2006), for an analysis of "in between" informants.

8. IF BASED ON THE STATEMENT OF A CRIMINAL INFORMANT, MAKE SURE THE AFFIDAVIT SETS OUT (1) THE BASIS FOR THE INFORMANT'S KNOWLEDGE, AND EITHER (2)(A) A BASIS ESTABLISHING THE INFORMANT'S CREDIBILITY OR (2)(B) A BASIS ESTABLISHING THAT THE INFORMANT'S INFORMATION IS RELIABLE.

If the source for the affidavit is a criminal informant, reliability must be determined by the two-pronged *Aguilar-Spinelli* test, as adopted by the Tennessee Supreme Court in *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1989). The two-prong test requires both "(1) the basis for the informant's knowledge and either (2)(a) a basis establishing the informant's credibility or (2)(b) a basis establishing that the informant's information is reliable." *State v. Stevens*, 989 S.W.2d 290, 294 (Tenn. 1999).

Although the United States Supreme Court abandoned the *Aguilar-Spinelli* approach as too troublesome for the trial courts, and adopted a "totality of the circumstances" approach in *Illinois v. Gates,* 462 US 213 (1983), Tennessee courts still adhere to the *Aguilar-Spinelli* standard. In *Jacumin*, our Court said this standard is more in keeping with the Tennessee Constitution, Art. I, Sect. 7, that a search warrant not issue "without evidence of the fact committed."

The affidavit can't merely state that the informant is reliable or credible, but must state facts demonstrating this. As long as it has some verifying information (i.e., arrests resulting in seizure or conviction, etc.), then it is sufficient. If the affidavit only states that past information given by the criminal informant has proven true and accurate, then it is merely conclusory and not sufficient. *State v. Lowe*, 949 S.W.2d 300, 304-06 (Tenn. Crim. App. 1996).

9. WHEN SIGNING THE WARRANT, WRITE ON IT THE DATE AND TIME, AND THE NAME OF THE OFFICER TO WHOM DELIVERING THE WARRANT.

If you don't put the exact time on the warrant, it could be argued that the warrant was obtained after the officer had already executed the search or seizure. The officer you deliver the warrant to must also be present when it is executed, so if an officer wishes to "hit" several places at the same time, that officer can be the affiant on each affidavit to obtain the separate warrants, but you must deliver each warrant to each separate officer who intends to execute that warrant, and that officer's name must be endorsed on that particular warrant. "The search warrant may only be executed by the peace officer, or one of them, to whom it is directed, and by no other person, except in aid of such officer, at the officer's request, he or she being present and acting in its execution." Tenn. R. Crim. P. 41 (d).

> Where the issuing magistrate fails to endorse on the warrant the hour, date, and name of the officer to whom it is delivered for execution, the search is illegal. .... The express language of the rule provides that the "failure to endorse thereon ... the name of the officer to whom issued" renders the search and seizure "illegal." Tenn. R. Crim. P. 41(c). This language is plain, mandatory and must be followed.

State v. Stepherson, 15 S.W.3d 898, 902 (Ct. Crim. App. 1999).

10. GIVE THE ORIGINAL AND ONE EXACT COPY TO THE OFFICER, AND KEEP ONE EXACT COPY UNTIL RETURN IS MADE.

> Rule 41(c) of the Tennessee Rules of Criminal Procedure provides in pertinent part:
>
> The magistrate shall prepare an original and two exact copies of the search warrant, one of which shall be kept by the magistrate as a part of his or her official records, and one of which shall be left with the person or persons on whom the search warrant is served. .... Failure of the magistrate to make said original and two copies of the search warrant or failure to endorse thereon the date and time of issuance and the name of the officer to whom issued, ... shall make any search conducted under said warrant an illegal search and any seizure thereunder an illegal seizure.

In *State v. Gambrel*, 783 S.W.2d 191 (Tenn. Crim. App. 1989), the magistrate retained a physical copy of the warrant, but due to the weakness of the carbon impression, the wording that was written into the blanks in the form's printed language on the magistrate's copy was "barely legible." The Court observed in *Gambrel* that the "purpose of having the magistrate retain a copy

... is to insure the purity of the search process." *Id.* at 192. It pointed out that the rule protects against any post-issuance alteration of the original warrant and "gives the judge control to insure that the warrant is executed and returned to the magistrate in a timely manner ...." *Id*. However, they noted that the written portion of the warrant was merely dim, not absent, and that the copy left with the magistrate was an "exact copy" that complied with Rule 41(c). *Id.*

Although the affidavit does not have to be attached to or kept with the warrant, you should keep a copy of it in case judicial review is later required.

> While an affidavit must be retained in order to ensure subsequent judicial review of the probable cause determination, there is no statute or rule in Tennessee which requires an affidavit upon which a search warrant is issued to be attached or otherwise kept with the warrant. *State v. Smith*, 836 S.W.2d 137, 141 (Tenn. Crim. App. 1992). Rule 41(c), Tenn. R. Crim. P., contains mandatory recording and filing requirements for warrants, but not for affidavits. The affidavit is not considered part of the search warrant in this State even if it appears on the same printed form as the warrant. *Minton v. State*, 186 Tenn. 541, 212 S.W.2d 373 (1948); .... Therefore, the fact that the affidavit here was not attached to the warrant is inconsequential. The magistrate maintained a copy of the affidavit and it was made a part of the record at the hearing on the defendant's motion to suppress.

State v. Henning, 975 S.W.2d 290, 296 (Tenn. 1998).

11. REMIND THE OFFICER TO EXECUTE THE WARRANT WITHIN 5 DAYS, AND LEAVE YOUR COPY OUT UNTIL THE RETURN IS MADE, AS A REMINDER TO CALL THE OFFICER IF NO RETURN MADE PROMPTLY.

Tenn. Code Ann. § 40-6-107 (a) states that a search warrant "shall be executed and returned to the magistrate by whom it was issued within five (5) days after its date, after which time, unless executed, it is void."

There is no specific time period mentioned for the <u>return</u> on the warrant. Even if no return is ever made, this does not prove fatal. "[T]he return of an officer upon a search warrant is a ministerial function and does not affect the validity of the warrant and its execution by the officer." *Anderson v. State*, 512 S.W.2d 665, 668 (Tenn. Crim. App. 1974). However, to insure that any property seized, especially illegal drugs or money, is properly accounted for, you should require a return, even if the officer did not serve the warrant (in which case the return would be signed by the officer, endorsed "Warrant not served.") In this way a record is made by the officer even if nothing was seized, to rebut a possible later claim against the government that property was seized. "The return shall be made promptly and shall be accompanied by a written inventory of any property taken." Tenn. R. Crim. P. 41 (d).

"We hold that the five-day period in which a search warrant must be executed under Tennessee Code Annotated § 40-6-107 and Rule 41(d) of the Tennessee Rules of Criminal Procedure is to be computed using calendar days rather than hours. Thus, a search warrant is valid if executed by midnight of the fifth day after its issuance, with the calculation of days to exclude the day of issuance. The first of the five days to be counted in this case was March 14,

1998, the day after the March 13, 1998 date of issuance. Had the warrant not been executed by midnight on March 18, 1998, the warrant would have been void. However, the execution of the warrant occurred at 10:00 a.m. on March 18, 1998, and thus the warrant was lawfully executed." *State v. Stanley*, 67 S.W.3d 1, 3 (Tenn. Crim. App. 2001).

12. WHEN YOU SIGN AND DATE THE RETURN, MAKE SURE THE OFFICER HAS SIGNED IT FIRST, AND THAT THE ORIGINAL WARRANT IS FILED WITH <u>YOUR</u> COURT CLERK'S OFFICE.

Tenn. R. Crim. P. 41 (d) provides in pertinent part that the "magistrate shall ... transmit the executed original warrant with the officer's return and inventory to the clerk of the court having jurisdiction of the alleged offense in respect to which the search warrant was issued." As a practical matter, you should have it filed with your court clerk in a permanent warrant book, even if you don't handle criminal cases. Two or three years from the date it was executed, it may be needed as an exhibit in federal court, and no one will remember whether it has been filed with the general sessions, chancery, circuit or criminal court clerk. Often, no arrest is made at the time the warrant is served, and so it is impossible to determine which court will ultimately handle the case, or if a case will ever be brought.

13. FILE YOUR EXACT COPY OF THE WARRANT IN YOUR PERMANENT FILES.

Don't confuse your copy, kept when you issued the warrant, with the original warrant on which the return was made. Once the return is made, you should file your copy in your own personal records. It may be needed as an exhibit if there is a later allegation that the officer altered the original warrant after its issuance (changing the address, description of items to be seized, etc.), or if the original warrant is lost.