

## Controlled Buys, Middlemen, and Probable Cause

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Last week, the Court of Appeals of North Carolina decided [State v. Frederick](#), a case about whether a controlled purchase of drugs provided probable cause to issue a search warrant. Before you say “the answer is yes, that fact pattern happens all the time,” be aware that *Frederick* presents a wrinkle. The wrinkle is that the controlled buy was conducted not by a confidential informant, but by an unknown “middleman” who the informant drove to the suspect’s home. Does the injection of an intermediary undermine probable cause? Read on to find out!

**Facts.** A Raleigh detective sought a search warrant for the defendant’s home. The affidavit in support of the application stated that a “confidential source” had recently given the officer “information . . . regarding a [drug] dealer.” The detective considered the source reliable as he had provided accurate information in the past.

The detective and the source attempted to corroborate the information by conducting two controlled buys in the week before the application was submitted. In both cases, the informant met with a “middle man,” who was apparently unknown to the detective, and took him to the suspect’s home. Officers watched the middleman enter the home and exit a few minutes later. The informant dropped the middleman off at his residence and then met with the detective. Each time, the informant had no drugs at the outset, and had drugs at the end of the expedition.

A magistrate issued the warrant. When officers executed it, they found heroin and MDMA.

**Procedural history.** The defendant was charged with trafficking in heroin and other offenses. He moved to suppress, arguing that the application did not provide probable cause. A superior court judge denied the motion. The defendant was convicted at trial and appealed, again advancing his argument that the search warrant was deficient.

**Majority opinion.** Two judges agreed with the State that there was probable cause to support the warrant. Considering the totality of the circumstances, noting the deference due to magistrates’ findings of probable cause, and citing *State v. Riggs*, 328 N.C. 213 (1991) (holding that probable cause existed for the issuance of a search warrant where informants had “been able to secure drugs by sending an observed third party,” also described as an “unwitting middleman,” to the defendants’ home), the majority stated:

“Based on [the detective’s] training and experience, the conduct of the middleman, and [the detective’s] personal observations, the magistrate here could reasonably infer that the middleman obtained MDMA and heroin from Defendant’s residence. Further, the magistrate could reasonably infer that there would probably be additional controlled substances at that location. Moreover, the magistrate could reasonably infer that the middleman did not have the MDMA or heroin in his possession when he met the confidential source, and his purpose in traveling to Defendant’s residence was to obtain the controlled substance the confidential source supplied to [the detective].”

**Dissent.** Judge Zachary dissented. She was troubled by “the lack of information concerning the reliability of the unknown middleman, the lack of detail regarding the controlled purchases, and the lack of independently corroborated facts contained in the affidavit.” In short, given that the original information from the informant was scant, “the essence of the affidavit in the case at bar established at most that the unknown middleman claimed to have purchased the drugs when he was inside defendant’s home.”

**Analysis.** The affidavit certainly could have been stronger. First, it said only that the detective received “information . . . regarding a [drug] dealer” from the informant. At least as far as the court’s opinion reveals, it did not indicate what the information was or how the informant had acquired it. Had the informant been in the suspect’s home and seen drugs? Had the informant purchased drugs from the suspect? Or was the “information” merely a rumor that the informant had picked up? The answers to these questions would help determine whether the controlled buys were playing a supporting role (needing only to corroborate information already provided by the informant) or a starring role (needing to support probable cause essentially on their own).

Second, the description of the controlled buys was quite brief, leaving the magistrate to make a number of inferences. For example, presumably the informant told the detective after each purchase that he provided the departmental funds to the middleman; that the middleman took them into the suspect’s residence; and that the middleman came out of the suspect’s residence with the drugs but no money. Yet this chain of events is not explicitly recounted in the affidavit. It also seems likely that the middleman said something about the transaction to the informant, like “I got what I needed from [the suspect].” But such comments, if indeed they were made, are not memorialized in the application either.

At the same time, probable cause is relatively low hurdle, and reviewing courts generally defer to magistrates’ determinations of probable cause. Those principles are well illustrated by *United States v. Artez*, 389 F.3d 1106 (10<sup>th</sup> Cir. 2004), a very helpful out-of-state case. The court there reversed a suppression order and ruled that two controlled buys, each made using an “unwitting informant” as an intermediary, helped to corroborate an informant’s report that a suspect was selling drugs. The court acknowledged that the use of an intermediary “introduces an additional layer of uncertainty to the transaction because it leaves open the possibility that the narcotics were acquired not at the suspect residence but at the location where the confidential and unwitting informants met before and after the transaction.” Yet the court still found that the controlled purchases had some corroborative value, and together with other incriminating facts, were sufficient to provide probable cause.

In light of the dissent, I would expect the defendant to ask the state supreme court to review *Frederick*. I don’t think that the outcome is a foregone conclusion. Stay tuned for further developments.