Examining Applicants under Oath before Issuing Search Warrants

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Suppose that Officer Oxford is investigating a murder. Oxford believes that Steve Smith is the killer, and that the murder weapon is in Smith's house. Oxford approaches Magistrate Martin with a search warrant application. The heart of the application is Oxford's sworn affidavit, which lays out the evidence establishing probable cause. G.S. 15A-245(a) provides that "[b]efore acting on the application, the issuing official may examine on oath the applicant." Should Magistrate Martin swear Oxford and ask Oxford to explain the case? Or should Martin ask Oxford to sit quietly while Martin reviews the written application?

Either approach is legally permissible, but if I were in Magistrate Martin's shoes, I would focus on reviewing the written application. This post explains why.

Either approach is legally permissible. As noted above, G.S. 15A-245 states that a judicial official "may" examine the applicant. It doesn't say "must," so Magistrate Martin is free to talk to Oxford about the case or to refrain from doing so. I have heard the argument that *State v. Upchurch*, 267 N.C. 417 (1966), requires the judicial official to examine the applicant, but I disagree. The court in that case did invalidate a search warrant issued by a clerk based in part on the clerk's noncompliance with G.S. 15-27, which then provided that a judicial official must "examin[e] [the applicant] or complainant in regard [to the affidavit]." But the central problem in *Upchurch* wasn't that the clerk focused on the written affidavit to the exclusion of oral testimony – it was that the clerk didn't make any assessment of probable cause *at all.* She testified that she merely "witness[ed] [the officer's] signature" and that was that. In any event, G.S. 15-27 and its mandatory language was repealed in 1973 when Chapter 15A, including G.S. 15A-245 and its discretionary language, was enacted. S.L. 1973-1286.

The benefits of focusing on the written application. Focusing on the written application avoids the risk of issuing a search warrant based on an oral recitation that includes important facts inadvertently omitted from the affidavit.

The search warrant will rise or fall with the affidavit. Information that an officer provides orally to a judicial official that is not included in the written application generally can't be considered when determining probable cause or when assessing the validity of the warrant after a motion to suppress. *See* G.S. 15A-245(a) ("information other than that contained in the affidavit may not be considered . . . in determining whether probable cause exists"); *State v. Benters*, 367 N.C. 660 (2014) (stating that "it was error to consider" evidence not contained within the "four corners" of the warrant application). There is an exception for information provided orally that is "recorded or contemporaneously summarized in the record," G.S. 15A-245(a), but judicial officials rarely record or summarize the information that officers provide.

The danger is that an officer, in the course of an oral presentation to a judicial official, will include facts or details that the officer knows but that he or she inadvertently omitted from the written application. Neither the officer nor the judicial official is likely to notice a slight disconnect between the oral presentation and the written affidavit. Yet the presence or absence of relatively minor details may make a difference when determining probable cause. A recent illustration of this point is *State v. Lewis,* __ N.C. App. __, __ S.E.2d __, 2018 WL 2011955 (May 1, 2018). As I discussed in this prior post, officers wanted to search a robbery suspect's house, but the search warrant affidavit described the residence only as a location at which they had arrested the suspect. They failed to include in the affidavit the fact that

the suspect lived there, thereby undermining probable cause. Yet it is entirely possible that if asked to summarize the case orally, the officers would have started off by saying “we need a search warrant for the house where a robbery suspect lives.” There’s no way of knowing precisely how common it is for officers to provide details orally that are not contained in a search warrant affidavit, but over the years I’ve bumped into a number of cases in which affidavits contained gaps that I suspect didn’t exist in the applicants’ oral recitations.

Summing up, it seems to me that the best chance for a judicial official to notice any gaps or defects in a search warrant application is for the official to focus on the written application. If, after reading the application, the judicial official sees a problem or has a question, the judicial official can then discuss the matter with the applicant, and either memorialize any additional information provided by the officer or ask the officer to amend or to revise the application.

I should add that I understand why some judicial officials prefer to ask officers to summarize their search warrant applications orally. It may be faster, and it avoids a potentially awkward silence while the applicant sits watching the judicial official read the application. And again, there’s nothing legally improper about doing things that way if the judicial official prefers it and finds it to be effective. But to my mind, at least, focusing exclusively on the written application is the approach most likely to result in accurate determinations of probable cause.