

## How's a Magistrate to Know Whether a Confidential Informant Is Reliable?

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Search warrant applications are often based on information from confidential informants. Whether the informant is reliable is critical. Information from a reliable informant is often sufficient to establish probable cause, while information from an informant whose reliability isn't established is often insufficient. So how's a magistrate to know whether an informant is reliable? A recent opinion from the court of appeals provides an opportunity to examine that question.

**Background.** The case is *State v. Brody*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_, 2017 WL 491222 (Feb. 7, 2017). It started with a drug investigation in Charlotte. An officer applied for a search warrant for the defendant's home. The affidavit said that the officer had received information from "a confidential and reliable informant" that the defendant was dealing drugs from his residence. Specifically, the informant claimed to have been in the defendant's home over thirty times, including within the last 48 hours, and stated that he had seen evidence of drug dealing each time. Further, the affidavit indicated that the "informant has arranged, negotiated and purchased cocaine from [the defendant] under the direct supervision of" the officer, though the application did not detail the time, place, or circumstances of the purchase.

Regarding the officer's experience with the informant, the affidavit continued:

Investigators have known this informant for approximately two weeks. This informant has provided information on other persons involved in drug trafficking in the Charlotte area which we have investigated independently. Through interviews with the informant, detectives know this informant is familiar with drug pricing and how controlled substances are packaged and sold for distribution in the Charlotte area.

**Procedural history.** A magistrate issued the search warrant, and officers executed it and found evidence of drug activity. The defendant was charged with several drug offenses. He moved to suppress, arguing that the affidavit did not provide probable cause for issuance of the search warrant. A superior court judge denied the motion, and the defendant pled guilty, reserving his right to appeal the suppression issue.

**Court of appeals finds sufficient reliability.** The court of appeals affirmed. Considering the totality of the circumstances -- including the officer's past experience with the informant and the supervised purchase of drugs that the informant had performed -- it ruled that "the magistrate had a substantial basis for determining that probable cause existed."

On the issue of the informant's reliability, the court said:

The affidavit stated both that (1) law enforcement officers independently investigated prior information provided by the CI; and (2) [the applicant] considered the CI to be a "reliable informant." The fact that the affidavit did not describe the precise outcomes of the previous tips from the CI did not preclude a determination that the CI was reliable. Although a general averment that an informant is "reliable"—taken alone—might raise questions as to the basis for such an assertion, the fact that [the officer] also specifically stated that investigators had received information from the CI in the past allows for a reasonable inference that such information demonstrated the CI's reliability.

**Analysis.** Determining whether information from a confidential informant constitutes probable cause requires a consideration of all the circumstances. The most common ways of establishing the reliability of an informant's report are by showing that "it is corroborated by other evidence, or [that] the confidential informant has a history of providing reliable information." *United States v. Butler*, 594 F.3d 955 (8th Cir. 2010).

As a long aside, those aren't the only possible ways of establishing reliability. North Carolina's appellate courts have also stated that an informant's report may be more credible if it contains self-incriminating information, *see, e.g., State v. Jackson*, \_\_\_ N.C. App. \_\_\_, 791 S.E.2d 505 (2016) (finding a first-time informant's report credible in part because the informant admitted purchasing drugs from the defendant; *Jackson* is discussed in [this](#) prior blog post), or if the report is extremely detailed and timely, *see, e.g., State v. Barhardt*, 92 N.C. App. 94 (1988) (finding a first-time informant's report credible in part because the informant "provided timely information [and] exact detail of the premises to be searched").

But those other possibilities weren't at issue in *Brody* -- just corroboration and the informant's history of reliability. The corroboration -- the fact that the informant had bought drugs from the defendant under the officer's supervision, presumably at some point within the two weeks prior to the drafting of the search warrant application -- strikes me as quite significant. My goal in this post, though, is to focus on when an informant's history of reliability is sufficient to make the informant's reports credible. To focus on that, imagine that there had been no controlled buy. Would there still have been probable cause? The court's opinion suggests that the answer might be yes, based on the reliability of the informant, but I am not so sure.

Without the controlled buy, the facts supporting reliability are the officer's statement that the informant was "reliable" and the fact that the officer had "investigated independently" other information provided by the informant. Let's look at each in turn:

- The officer's statement that the informant was "reliable" appears to be an opinion or a conclusion that does not provide the magistrate with the factual information necessary to determine on his or her own whether the informant's track record is convincing. The United States Supreme Court ruled in *Aguilar v. Texas*, 378 U.S. 108 (1964), that an officer's description of an informant as a "credible person" was a "mere conclusion" absent a description of the "underlying circumstances" that supported it. Although the specific test of probable cause that was used in *Aguilar* was revised in *Illinois v. Gates*, 462 U.S. 213 (1983), the basic point remains: an officer's statement that an informant has "provided reliable information in the past . . . is an unsupported conclusion which does not demonstrate probable cause." *United States v. Reddrick*, 90 F.3d 1276 (7th Cir. 1996). *See also* Wayne R. LaFave, *Search and Seizure* § 3.3(b) (5th ed. 2012). Admittedly, there is some older North Carolina case law that could support giving greater weight to an officer's endorsement of an informant's reliability. *See State v. Altman*, 15 N.C. App. 257 (1972) ("The affiant stated that the confidential informant, 'has proven reliable and credible in the past.' We are of the opinion that the circumstances set forth in support of the informant's reliability are the irreducible minimum on which a warrant may be sustained. The statement that the informant has proven reliable in the past is a statement of fact and not a mere conclusion. While we do not approve of such brevity in an affidavit, it does meet the minimum standards.").
- The fact that that officer had "investigated independently" other information provided by the informant strikes me as irrelevant given that the affidavit does not indicate the results of the investigations. Perhaps one could infer that the investigations confirmed the information provided by the informant, otherwise the officer would not have mentioned them. But that would be an assumption, and one that the affidavit itself does not directly support.

Bottom line, without the controlled buy, I think the affidavit would be rather weak. Of course, at the appellate stage, courts defer to magistrates' determinations regarding probable cause. *See, e.g., State v. Arrington*, 311 N.C. (stating that "great deference should be paid a magistrate's determination of probable cause" and that "after-the-fact scrutiny

should not take the form of a de novo review”). So perhaps even without the controlled buy, a magistrate’s finding of probable cause would have survived appellate review. But I think that a magistrate considering an affidavit like the one we are imagining would also be justified in requiring more information about the informant’s track record before finding probable cause. In order to avoid any uncertainty about probable cause, officers may wish to follow the advice in Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 427 (5th ed. 2016), to give some indication “of the kinds of cases for which the informant gave information, when those took place, and what the results were.” A few sentences of detail can make a big difference.