SEARCH AND SEIZURE: WARRANTS

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CHAPTER 7
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SEARCH AND SEIZURE: Warrants

I. INTRODUCTION

A review of Federal and State case law reveals an abundance of cases involving search and seizure. Most deal with exceptions to the warrant requirement and the reasonableness of those warrantless searches.

By and large, criminal law practitioners have a very different initial reaction when learning that a search was based on a warrant, rather than an exception to the warrant requirement. This should not be the case.

As a Judge, prosecutor, or defense attorney, you should never assume that a search warrant is valid. A “neutral and detached” magistrate’s review of the affidavit and warrant does not automatically make a warrant valid. Furthermore, a valid warrant makes no guaranty that the requisite search was reasonable.

This paper is intended to be a brief practical guide for evaluating search warrants and their execution. Hopefully it will be of some use to all criminal law practitioners dealing with search warrants.

A. History

It is common knowledge that the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Warrants, based on probable cause, are generally required to search or seize persons, places, and things. “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.” U.S. CONST. amend. IV. (The Fourth Amendment was originally the Sixth Amendment in the Bill of Rights proposed in 1789. Amendments I and II did not pass in 1791.)

The genesis of the Fourth Amendment can be traced to the “Writ of Assistance,” or more precisely, the injustices inflicted upon British subjects via the Writ of Assistance. The Writ of Assistance was a general warrant issued without probable cause to search a private residence. The object and location of the search did not have to be described. In Britain, the writs were initially used to search for “seditious writings” critical of the “Crown.” Later, in the colonies, the writs were used to search for contraband when enforcing the “Acts of Trade.” In addition to no probable cause being required to obtain a Writ of Assistance, Writs of Assistance remained valid for near perpetuity; expiration occurred only upon the death of the monarch in whose name they issued plus six months. This meant that writs could be executed multiple times.

The abuse of the Writ of Assistance was a major grievance in pre-revolutionary America. In 1761 Colonial lawyer James Otis, Jr. wrote of the Writ of Assistance,

It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book…I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand and villainy on the other, as this Writ of Assistance is.

Otis was not alone in that sentiment. The oppressive use of the Writ of Assistance made what would become the Fourth Amendment a constitutional priority for the framers.

B. The Texas Constitution

An analogous provision to the Fourth Amendment can be found in the Texas Constitution. “The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.” TEX. CONST. art. I, § 9. The Texas provision is generally interpreted in the same manner as the Federal Constitution. With that said, Texas can afford its citizens more protection under the State Constitution, as State constitutions cannot provide less protection than guaranteed by the Federal Constitution. (See generally Autran v. State, 887 S.W.2d 31 (Tex. Crim. App. 1994) (en banc).

C. Deference in Warrant Review

It is not necessarily easy to suppress evidence based on alleged search warrant deficiencies. The Court of Criminal Appeals has held that:

An evaluation of the constitutionality of a search warrant should begin with the rule “the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried action of officers who may happen to make arrests.” Reviewing courts should not “invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than commonsense, manner.” When in doubt, the appellate court should defer to all reasonable inferences that the magistrate could have made.
Search and Seizure: Warrants

State v. McLain, 337 S.W.3d 268 (Tex. Crim. App. 2011). This language clearly displays the tremendous deference given to already-issued search warrants. However, this does not mean that all warrants are in fact valid. When reviewing a search warrant, there are numerous considerations.

II. TEXAS STATUTORY FRAMEWORK

We know that both the United States and Texas Constitutions require a description of the place to be searched and the things to be seized. That is to say, “where were the police supposed to go and what were they looking for?” Beyond the “Constitutional” requisites, Texas has put forth a statutory scheme for search warrants in Chapter 18 of the Texas Code of Criminal Procedure.

Oral or telephonic search warrants are not allowed. “A search warrant is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate or commanding him to search for and photograph a child and to deliver to the magistrate any of the film exposed pursuant to the order.” TEX. CODE CRIM. PROC. ANN. Art. 18.01. (Vernon 2005).

A search warrant may be issued for the following:

(1) property acquired by theft or in any other manner which makes its acquisition a penal offense;
(2) property specially designed, made, or adapted for or commonly used in the commission of an offense;
(3) arms and munitions kept or prepared for the purposes of insurrection or riot;
(4) weapons prohibited by the Penal Code;
(5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;
(6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;
(7) a drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state;
(8) any property the possession of which is prohibited by law;
(9) implements or instruments used in the commission of a crime;
(10) property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense;
(11) persons;
(12) contraband subject to forfeiture under Chapter 59 of this code; or
(13) electronic customer data held in electronic storage, including the contents of and records and other information related to a wire communication or electronic communication held in electronic storage. TEX. CODE CRIM. PROC. ANN. Art. 18.01. (Vernon 2005).

Chapter 18 also puts forth the basic requisites for the warrant itself. “A search warrant issued under this chapter shall be sufficient if it contains the following requisites:

(1) that it run in the name of "The State of Texas";
(2) that it identify, as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched;
(3) that it command any peace officer of the proper county to search forthwith the person, place, or thing named; and
(4) that it be dated and signed by the magistrate.” TEX. CODE CRIM. PROC. ANN. Art. 18.04. (Vernon 2005).

III. THE SEARCH WARRANT

In reviewing a search warrant, a good place to start is by viewing the warrant through the statutory framework without examining the affidavit. In fact, Article 18.04 can serve as a quick checklist.

With the advent of computers, peace officers and prosecutors have developed forms and templates for search warrants. Virtually all search warrant templates will automatically have “The State of Texas” language, required by subsection (1), at the top of the warrant page. Additionally, the warrants will generally have the “command” language as required by subsection (3). Do note that while search warrant templates can be a great convenience for peace officers and prosecutors in drafting warrants, they can also be a trap. This can be particularly true with regard to subsection (2). This concept is illustrated in Groh v. Ramirez, 540 U.S. 551 (2004). In Groh, the object of the search was prohibited weapons. However, a description of the location to be searched was inadvertently cut and pasted to the “items to be seized section of the warrant. There was nothing in the warrant describing the items to be seized; and though those items were described in the accompanying search warrant affidavit, the warrant was no good because it did not incorporate the affidavit by reference. The Court went on to find no qualified immunity in this civil suit for the defect, holding that, “…even a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a
glaring deficiency that any reasonable police officer would have known was constitutionally fatal.”

Finally, is the warrant signed AND dated? The date the warrant issues is important due to the limited time for execution as set forth in under Articles 18.06(a) and 18.07 of the Texas Code of Criminal Procedure.

IV. THE AFFIDAVIT & PROBABLE CAUSE

As a practical matter, reviewing the actual warrant without the affidavit is easy. Things can become a bit more involved when reviewing the probable cause affidavit, which ostensibly supported the issuance of the warrant in the first place.

There is no one size fits all formula for search warrant affidavits. With that said, there are some basic Constitutional minimums for the probable cause affidavit: (1) the affidavit must identify the affiant; (2) the magistrate is entitled to know who swore to the statement; (3) it must give a specific location for the search, be it a business, a residence or a body; (4) the description should be specific and virtually eliminate all other locations; (5) it must describe what is being sought; (6) it should be signed and sworn to; and (7) it should set forth probable cause.

“Probable cause for a search warrant exists if, under the totality of the circumstances presented to the magistrate, there is at least a ‘fair probability’ or ‘substantial chance’ that contraband or evidence of a crime will be found at the specified location.” Flores v. State, 319 S.W.3d 697 (Tex. Crim. App. 2010). Probable cause is much more than mere suspicion and much less than proof beyond a reasonable doubt. It is not possible cause.

A. The Four Corners Rule

Probable cause must be found within the “Four Corners” of the search warrant affidavit. That is to say that the affidavit facially sets forth probable cause or not.

With regard to a motion to suppress, a trial court cannot use extrinsic evidence to supplement the probable cause affidavit. Additionally, the State cannot call a witness to testify to additional facts supporting probable cause that were not included in the original affidavit. However, extrinsic evidence will be allowed to prove that the affidavit was sworn to. In Smith v. State, authorities executed a search warrant with an unsigned affidavit. 207 S.W.3d 787 (Tex. Crim. App. 2006). At the motion to suppress hearing, the issuing magistrate testified that it was his usual practice to have Affiants swear to the affidavit in his presence. The trial court denied the motion to suppress. The Court of Criminal Appeals held that the “four corners” rule, which states that a court is to determine whether the magistrate had sufficient facts to establish probable cause to issue a search warrant based upon the “four corners” of the affidavit, only applies to assessment of probable cause; it does not apply to the issue of whether the affiant swore to the affidavit's truthfulness.

As a practical matter, issuing magistrates should be especially mindful of the four corners rule. It is human nature to chat with the officer who is seeking the search warrant. If your conversation veers into facts needed to find probable cause, make sure the affidavit sets forth probable cause without the conversation.

B. Sources of Probable Cause

There are numerous sources for probable cause in search warrant affidavits. The Court of Criminal Appeals discussed many of these sources in State v. Duarte, 389 S.W.3d 349 (Tex. Crim. App. 2012). Sources for probable cause include, but are not limited to: the Affiant’s personal knowledge or experience, peace officers, named informants, confidential informants, anonymous informants, and statements against penal interest. With regard to whatever the source of the probable cause is, the magistrate is entitled to know why that source is worthy of believability. A brief discussion of each of these sources now follows:

1. Peace Officers

Peace officers are presumed credible and magistrates are entitled to rely upon their opinion when reviewing the affidavit. See generally Texas v. Brown, 460 U.S. 730 (1983).

2. Named Citizen Informants

The named informant is generally worthy of belief because of the fact that he or she is identified, presumably willingly. In Wilkerson v. State, the court held that, “[w]hen a search warrant affidavit contains information given by a named informant, the affidavit is sufficient if the information is direct knowledge on his or her part.” 726 S.W.2d 542 (Tex. Crim. App. 1996)

3. Confidential Informants

The confidential informant is not automatically worthy of belief. There must be information in the affidavit detailing why the confidential informant is worthy of belief by the affiant and the magistrate. As the Supreme Court suggested in Illinois v. Gates, such reliability is most often established by prior successful experience of the affiant with the confidential informant and a short recitation of affiants experiences in the affidavit. 462 U.S. 213 (1983).

4. Anonymous Informants

The anonymous informant requires additional bolstering on the part of the Affiant. The landmark
case on this issue is Illinois v. Gates. Typically, an anonymous informant source is made credible when the affiant does an extensive additional investigation that corroborates the anonymous tip, therefore building a big picture of probable cause.

5. Statements Against Penal Interest

Statements against penal interest are a unique source of probable cause. Since United States v. Harris, courts have generally held that a person who admits to committing a penal offense is presumed to be telling the truth with regard to that criminal enterprise and things related to it. 403 U.S. 573 (1971). Furthermore, in line with Massachusetts v. White, courts continue to hold that such statements do not have to be in a form that would make it admissible against the person who made the statement. 439 U.S. 280 (1978). However, the statement must be one that, if true and provable, would support charging the person a witness.

6. Staleness

The information must be current enough to reasonably provide a fair probability that the object of the search will still be at the site. As the Court of Criminal Appeals stated in Crider v. State.

There must be sufficient facts within an affidavit in support of the application for a search warrant to support a probable cause finding that the evidence is still available in the same location. The proper method to determine whether the facts supporting a search warrant have become stale is to examine, in light of the type of criminal activity involved, the time elapsing between the occurrence of the events set out in the affidavit and the time the search warrant was issued.


Staleness must be evaluated on the facts of each case and the nature of the evidence being sought. Staleness factors include: (1) how recently the targeted item was known to have been at the location; (2) the ease of moving the object; (3) the object’s propensity to deteriorate or perish; (4) the ability to consume or dispose of the object; and (5) the market for the object and the enduring utility of the object to the possessor. As a general rule, drugs, cash, and weapons are highly fungible, as they do not stay in the same place for very long. Other items can remain at a location for weeks, months, and beyond. For example, you have the 8-liners set up in game rooms that remain there until they are raided. You have the stolen furniture that has been incorporated into a home. You could even have appliances that have been incorporated into the fixtures of a residence. Unfortunately, in this day in age, you have the child pornography that defendants build into huge collections over a period of months or years. In any event, the targeted object of the search should aide in the determination of staleness.

Remember not to confuse the issue of staleness with the time for warrant execution. The staleness analysis for a search warrant affidavit applies to the date the warrant was issued, not the date of execution.

2. Conclusory Statements

As a practical matter, the most common problems in probable cause affidavits arise when the probable cause is based on conclusory statements. Generally speaking, a conclusory statement sets forth the affiant’s belief without including into the basis for the belief. As the Court of Criminal Appeals stated in Rodriguez v. State, “probability (for probable cause) cannot be based on mere conclusory statements of an affiant’s belief.” 232 S.W.3d 55 (Tex. Crim. App. 2007). It is not reasonable for a magistrate to act on unsupported conclusions, regardless of the trustworthiness of the affiant.

Consider this example of a conclusory statement in a search warrant affidavit: “I learned through investigation that there is heroin in a residence at 917 Davis Street, in Houston Harris County Texas.” The statement in no way provides how the affiant came to his belief. In the alternative, consider this revised, non-conclusory statement establishing the basis of affiant’s belief: “Yesterday, the occupant of the residence located at 917 Davis Street, Houston, Harris County, Texas, told me that he had heroin in the residence. He said he sells some of it to obtain funds to buy more of the drug and thereby support his own addiction to the drug.” (Note- this is also an example of a statement against penal interest.)

Here is another example of a conclusory statement: “The confidential informant is reliable and credible.” This statement clearly reflects that the affiant believes that the confidential informant is trustworthy, but it fails to establish the basis for that belief. A better, non-conclusory way of establishing the credibility of the confidential informant could be said as follows: “The confidential informant has given me information of this type, about illegal narcotics possession and trafficking, on numerous prior occasions. In each instance, the information was proven to be accurate and true, either through independent corroboration by me or by execution of search warrants that revealed the information to be correct.”
With all this said, do keep in mind that the presence of conclusory statements in a search warrant affidavit is not necessarily fatal. The question is whether or not the warrant affidavit sets forth probable cause without such statements.

3. Was the Probable Cause Lawfully Obtained?
   When reviewing a probable cause affidavit, make sure that probable cause was lawfully obtained. The courts have held that certain methods of acquiring probable cause violate the Fourth Amendment; this usually occurs when an illegal search lead to the acquisition of probable cause.

   In Kyllo v. United States, law enforcement agents used a thermal imager to acquire details from a private residence. 533 U.S. 27 (2001). Those details were then incorporated into a search warrant affidavit. The Court held that the imaging was itself an illegal warrantless search and remanded the case for an evaluation of the probable cause affidavit, absent the illegally obtained information. In Florida v. Jardines, officers took a trained, narcotics-sniffing canine to the front door of a private residence. 133 S.Ct. 1409 (2013). When the canine gave a positive alert for the presence of narcotics, the affiant incorporated the positive alert in the search warrant affidavit and warrant. The Supreme Court held that the taking of the dog to the front door of the residence was a trespassory invasion of the curtilage, constituting an improper search for Fourth Amendment purposes.

   Always make sure that the basis for probable cause was not an illegal act such as a trespass or an illegal wiretap. In the event the affidavit does contain this type of tainted probable cause, it does not necessarily invalidate the warrant. Per Kyllo, to evaluate whether the redacted affidavit sets forth probable cause, the affidavit must be read without the tainted information.

   In those situations where part of the probable cause was illegally obtained, the Court of Criminal Appeals has stressed, that there still should be no hyper-technical interpretation of the remainder of the affidavit. See State v. Phu Le, 2015 WL 1933960, __S.W. 3d __ (Tex. Crim. App. 2015).

4. Was the Affidavit Truthful?
   In Franks v. Delaware, the Supreme Court dealt with the issue of reckless or deliberately false statements contained in search warrant affidavits. 438 U.S. 154 (1978). The Court held that the veracity of affidavits could be challenged, but the challenge itself must be in the form of a “substantial preliminary showing of the material falsehood. In other words, a mere assertion of falsehoods is not enough.

   If the material falsehoods are proven, they must have been knowingly or recklessly made. If that is shown, then the materially false statements are excised from the warrant for a new probable cause analysis by the trial court. If the redacted affidavit fails to state probable cause, the evidence recovered pursuant to the warrant will be excluded.

   As a practical matter, Franks hearings are few and far between. It is difficult to satisfy the threshold showing and even more difficult to show that the affiant made the statements knowingly or recklessly.

V. GOOD FAITH EXCEPTIONS
A. The United States Supreme Court
   In United States v. Leon, the Supreme Court adopted a good faith exception to the Fourth Amendment exclusionary rule. 468 U.S. (1984). The Court held that where officers obtained evidence pursuant to a facially valid warrant which was later found to have lacked probable cause, the exclusionary rule would not apply. The Court explained that in essence, the exclusionary rule was crafted as a sanction to punish law enforcement personnel who violate the Fourth Amendment. In this case, the officers obtained and executed what they believed was a valid warrant; therefore, they should not be punished by excluding the evidence recovered.

   The Supreme Court further addressed the issue of good faith in Davis v. United States, 131 S.Ct. 2419 (2011). The Court held that a police search conducted in objectively reasonable reliance on binding appellate precedent is not subject to the exclusionary rule. Although Davis involved a warrantless search, the concept of police reliance on binding precedent could certainly come into play with the warrant situation.

B. The Texas View
   Texas has a statutory exclusionary rule which includes a good faith exception:

   “It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.” TEX. CODE CRIM. PROC. ANN. Art. 38.23(b).

   In light of Texas’ statutory good faith exception, it is has generally been accepted that the exceptions in Leon and Davis, would be inapplicable in Texas. However, it should be noted that the statutory good faith exception is an exception, not the only exception. The Court of Criminal Appeals has recently alluded to this in McClintock v. State, 444 S.W.3d 15 (Tex. Crim. App. 2014). In McClintock, the Court of Criminal Appeals remanded for the First Court of Appeals to rule whether the Davis exception or our statutory exclusionary rule would apply in a search warrant based on a dog sniff at the front door. (This case could have a huge impact on Texas search and seizure law.)
VI. THE REASONABLENESS REQUIREMENT
A. The Scope of the Search

Just because a search was made pursuant to a valid search warrant does mean that the search passes constitutional muster. The Constitution prohibits unreasonable searches and seizures with or without a warrant. No analysis of a search pursuant to a warrant is complete without reviewing the manner in which the warrant was executed. This method of warrant execution review should begin with an examination of the scope of the search.

A search that was done beyond the scope of the warrant is unreasonable. In United States v. Ross, the Supreme Court held “the lawful search of fixed premises generally extends to the entire area in which the object of the search may be found.” 456 U.S. 798 (1982). In looking at this issue, ascertain what was recovered pursuant to the search warrant. This will usually be detailed in the inventory or the police offense report. Presumably, at least some of the seized evidence will be incriminating as to the defendant. Then ask whether that incriminating evidence was within the scope of the search as contemplated by the warrant?

For example, say that a search warrant was for cocaine. During the course of the search for cocaine, the searching officer recovered heroin from the cookie jar on top of the refrigerator. That heroin is admissible, as it was recovered from a location where the suspected cocaine could have been recovered and it is contraband.

Now suppose that the search warrant was for stolen property, namely a matched “Neptune Series” Maytag washer and dryer. During a search of the location for the washer and dryer, the same heroin was recovered in the same cookie jar. The heroin would be suppressed, as it was not within the scope of the warrant. The washer and dryer would not be in the cookie jar. Thus the search pursuant to the execution of the warrant in that instance would be unreasonable.

In the alternative, imagine that during the same search for the washer and dryer, that heroin is out in the open on the table in the laundry room. The heroin would now be admissible under the plain view doctrine.

This limitation of scope has been referred to as “The Elephant in the Matchbox Rule.” That is to say that it is unreasonable to look for an elephant in a matchbox.

The notion of exceeding the scope is fairly easy to grasp when reviewing searches for physical evidence. With that said, the concept also applies to searches of computers and electronic data storage devices. For example, say a search warrant authorized the recovery of all financial records and tax returns. The actual search of the computer revealed child pornography in a folder containing mp4 video files. Arguably, the scope of the warrant was exceeded because it would not be reasonable to look for tax returns in a video file.

Compare that to a warrant that authorized the recovery of photographic and video evidence relating to gang membership. If the search of the computer revealed that same child pornography, the evidence would be admissible, as it was found in a location (albeit electronic) where law enforcement was authorized to search.

Finally, if there was something obviously incriminating on the background of the desktop, and it was visible when the computer was turned on, (prior to any searches of files) that would be admissible as evidence in plain view. Note that it could also serve as the basis for probable cause in a second warrant.

B. Searching People at the Search Warrant Location

A search warrant generally authorizes a search of any individuals named or described in the warrant. However, as the Supreme Court noted in Ybarra v. Illinois, searching someone because he is merely present at a search warrant location is unreasonable. 444 U.S. 85 (1979). Courts have held it reasonable to detain all individuals present at the location where the warrant is executed. Additionally, it is reasonable to search those persons named or described in the warrant/affidavit. Those unnamed or undescribed individuals at the location may be subject to search based on some exception to the warrant requirement such as consent or a search incident to arrest.

VII. CONCLUSION

A search warrant is essentially a court order whereby a magistrate authorizes police officers to engage in acts that would constitute serious felony offenses, if the conduct was engaged in by a private citizen without judicial authorization. Clearly, the search of the home would be a home invasion aggravated robbery, or at the very least a burglary of a habitation. A blood draw would be an aggravated assault. The search of a computer would constitute a breach of computer security.

Given the historical basis for requiring search warrants in the United States and the nature of the conduct which they authorize, they should not be taken lightly. Defense attorneys, prosecutors, magistrates, and reviewing courts should remain mindful of the serious nature of the search warrant. You must carefully review each warrant that comes before you and scrutinize how that warrant was executed.