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Search & Seizure

People v. Hetrick[1691]
(decided November 18, 1992)

The defendant claimed, *inter alia*, that a search warrant issued based on the sworn testimony of a nine year old child failed to constitute probable cause[1692] within the meaning of the state[1693] and federal[1694] constitutions and thus the evidence seized should have been suppressed.[1695] The court of appeals held that "the child's hearsay statements" were sufficient to serve as the basis for the probable cause necessary to issue the search warrant.[1696]

Hope Graves, and her nine-year-old daughter, Katy Hetrick, came to the Elmira Heights police station in August of 1988 to report that Katy "had seen her father, the defendant, engaging in illegal drug activity."[1697] By both oral and written statements, Katy reported to the police that she saw her father, along with others, using cocaine and marijuana during her visits with him. In her statements, she described such things as the drugs, the drug paraphernalia, "how they were used, and where they were stored."[1698] She also reported that she had asked her father what the "stuff" was, and he told her that it was "pot and coke."[1699] In addition to the statements, Hope Graves also submitted pic-

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1691. 80 N.Y.2d 344, 604 N.E.2d 732, 590 N.Y.S.2d 183 (1992).

1692. *Id.* at 346, 604 N.E.2d at 733, 590 N.Y.S.2d at 184 (The defendant also alleged that the child's hearsay statements which served as the basis for the search warrant were not proper because the judge issuing the warrant "failed to examine [the child] pursuant to CPL 60.20 as to her ability to understand the nature of an oath.). The court held that "CPL 60.20 did not require the magistrate to examine the child prior to issuing the warrant," *id.*, because the statute's presumption against child testimony is solely an "evidentiary rule relating only to the capacity of a child witness to give competent evidence admissible at a criminal proceeding." *Id.* at 350, 604 N.E.2d at 735, 590 N.Y.S.2d at 186.

1693. N.Y. CONST. art. I, § 12.

1694. U.S. CONST. amend. IV.

1695. *Hetrick*, 80 N.Y.2d at 346, 604 N.E.2d at 733, 590 N.Y.S.2d at 184.

1696. *Id.*

1697. *Id.*

1698. *Id.*

1699. *Id.*

tures Katy had drawn for her describing what she had seen during her visit with her father. The pictures included that of a "'pipe, a pot cigarette, a mirror showing coke on it with a person's nose on the end, and a large plastic thing they also smoke pot out of.'"[1700]

According to Katy's statements, the defendant kept the drugs on the kitchen table.[1701] The girl also told the police about a trip she took with her father where he purchased drugs. She described how the cocaine the defendant purchased came in "smaller plastic bags," the fact that he sniffed and smoked the cocaine in her presence, and that he later took the drugs home with him.[1702] During her statement to the police officer, Katy declared twice that she knew that what the defendant did with the drugs was "illegal and bad," and that "to protect [her]self," (and because she was scared) she "always went into the other room" when she saw her father using the drugs.[1703]

At the close of her statement, the officer prepared an affidavit. Both he and the child's mother read Katy a "legal warning concerning false statements."[1704] They proceeded to question her as to her ability to distinguish a truth from a lie.[1705] In response, Katy stated that she could distinguish the difference between the two, and noted that "she could get in trouble for telling a lie."[1706] Finally, the Chief of Police, before allowing Katy to sign the affidavit, again questioned her as to her understanding of the difference between a truth and a lie. For the second time, Katy affirmed her understanding.[1707]

After all parties (the mother, the child, and the Chief of Police) had signed the affidavit, the police officer "presented a sworn warrant application to a Village Justice who issued a search

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1700. *Id.*
1701. *Id.*
1702. *Id.* at 346-47, 604 N.E.2d at 733, 590 N.Y.S.2d at 184.
1703. *Id.* at 347, 604 N.E.2d at 733, 590 N.Y.S.2d at 184.
1704. *Id.*
1705. *Id.*
1706. *Id.*
1707. *Id.*

warrant for defendant's apartment."[1708] During the search the police uncovered drugs and drug paraphernalia in Hetrick's apartment, and subsequently, arrested and charged him with various counts of drug possession as well as endangering the welfare of a child.[1709]

The defendant's motion to suppress the evidence was denied, and he thereafter pleaded guilty.[1710] The appellate division affirmed the denial, based in part on the fact that the child's information satisfied the probable cause requirement for the issuance of a search warrant.[1711] The court of appeals affirmed the lower courts' decisions, ruling that the county court "properly denied defendant's motion to suppress physical evidence seized upon the execution of the warrant."[1712]

The court of appeals began its analysis by noting that under both the federal[1713] and state[1714] constitutions "no warrant may issue except upon probable cause based on facts presented to the magistrate under oath or affirmation."[1715] The court stated that the probable cause can be satisfied by unsworn hearsay "when the police officer applying for the warrant has knowledge of facts derived from a reasonably trustworthy source sufficient to cause a person of reasonable caution to believe that contraband is present in the premises to be searched.[1716]

The court noted that two tests exist which courts utilize when deciding whether the probable cause requirement for a valid warrant can be based on "unsworn hearsay": the *Aguilar-*

1708. *Id.*

1709. *Id.* at 347, 604 N.E.2d at 733-34, 590 N.Y.S.2d at 184-85.

1710. *Id.*

1711. *Id.* at 347-48, 604 N.E.2d at 734, 590 N.Y.S.2d at 185.

1712. *Id.* at 350, 604 N.E.2d at 735, 590 N.Y.S.2d at 186.

1713. U.S. CONST. amend. IV.

1714. N.Y. CONST. art I, § 12.

1715. *Hetrick*, 80 N.Y.2d at 348, 604 N.E.2d at 734, 590 N.Y.S.2d at 185.

1716. *Id.*; *see also*, People v. Bigelow, 66 N.Y.2d 417, 423, 604 N.E.2d 451, 455, 497 N.Y.S.2d 630, 634 (1985) (declaring that "probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place").

Spinelli[1717] two-prong test and the *Illinois v. Gates*,[1718] totality-of-the-circumstances test.[1719] The court explained that the United States Supreme Court had rejected the *Aguilar-Spinelli* test in *Gates* and instead adopted the "more permissive" totality of the circumstances test.[1720] As the court stated, however, New York refused to follow the Supreme Court and continues to adhere to the *Aguilar-Spinelli* test "as a matter of State constitutional law."[1721] Thus, under the *Aguilar-Spinelli* two-prong test, the probable cause requirement for a warrant is satisfied "if there is a reasonable showing that the informant was reliable and had a basis of knowledge for the statement."[1722]

In applying the *Aguilar-Spinelli* test to Katy's statements, the court of appeals found her statements to be an acceptable basis for probable cause.[1723] The court found that the child's personal

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1717. Aguilar v. Texas, 378 U.S. 108, 114 (1964) (stating that the magistrate, before issuing a warrant, must be given sufficient facts upon which he can determine if the informant was reliable and whether he had a basis for his knowledge); Spinelli v. United States, 393 U.S. 410, 412-13 (1969) (reiterating the *Aguilar* two-pronged test).

1718. 462 U.S. 213 (1983).

1719. *Hetrick*, 80 N.Y.2d at 348, 604 N.E.2d at 734, 590 N.Y.S.2d at 183.

1720. *Id.* at 348, 604 N.E.2d at 734, 590 N.Y.S.2d at 183. In *Gates*, the Supreme Court declared that the "reliability" and "the basis of knowledge" of the informant are "highly relevant," but such factors should not be seen as totally separate requirements "to be rigidly exacted in every case," but rather should be seen as "closely intertwined issues" that may help illuminate other relevant factors. 462 U.S. at 230-31.

1721. *Hetrick*, 80 N.Y.2d at 348, 604 N.E.2d at 734, 590 N.Y.S.2d at 185.

1722. *Id.*; *see also Aguilar*, 378 U.S. at 114; *Spinelli*, 393 U.S. at 412-13; People v. Griminger, 71 N.Y.2d 635, 639, 524 N.E.2d 409, 410, 529 N.Y.S.2d 55, 56 (1988) (providing that under the two-prong *Aguilar-Spinelli* test, "the application for a search warrant must demonstrate to the issuing magistrate (i) the veracity or reliability of the source of the information and (ii) the basis of the informant's knowledge"); In People v. Rodriguez, 52 N.Y.2d 483, 420 N.E.2d 946, 438 N.Y.S.2d 754 (1981), the court found that the informant was "sufficiently reliable and was possessed of a sufficient basis of knowledge where the informant was in police custody on an unrelated charge, the information given matched in many ways information the police had already uncovered in their investigation, and the description of defendant was accurate." *Id.* at 492-93, 420 N.E.2d at 951-52, 438 N.Y.S.2d at 760.

1723. *Hetrick*, 80 N.Y.2d at 348, 604 N.E.2d at 734, 590 N.Y.S.2d at 183.

observations of the events she described showed "without question" that she had a "basis of knowledge for her statements," and so satisfied the first prong of the test.[1724] The court determined that the reliability prong was also satisfied because her affidavit was "detailed and specific."[1725] Moreover, the court of appeals found that the reliability of her statements was proven by her obvious "understanding of the importance of truthfulness before her mother," the police officer and the Chief of Police.[1726] The court decided that the reliability of the child's statements was proven to such an extent that "a reasonable person would conclude that contraband was present in defendant's apartment."[1727] Finally, the court, relying on its previous decisions in *People v. Hicks*[1728] and *People v. Cantre*,[1729] declared that there existed a "'built-in' basis for crediting [Katy's] reliability," since she came forward with her information as an "identified citizen informant," rather than an anonymous informant.[1730] Therefore, according to the court's analysis, Katy's statements had satisfied both prongs of the *Aguilar-Spinelli* test.

Although the New York Constitution, article I, section 12 is identical to the Fourth Amendment of the United States Constitution, New York courts have chosen a different standard than that of the United States Supreme Court in judging the sufficiency of the probable cause upon which a warrant is issued. The Supreme Court's totality-of-the-circumstances approach out-

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1724. *Id.*

1725. *Id.*

1726. *Id.*

1727. *Id.* at 348-49, 604 N.E.2d at 734, 590 N.Y.S.2d at 185.

1728. 38 N.Y.2d 90, 92, 341 N.E.2d 227, 229, 378 N.Y.S.2d 660, 662 (1975) (stressing the fact that the "informant was named," and therefore, the officer's knowledge was "derived from a reasonably trustworthy source").

1729. 65 N.Y.2d 790, 482 N.E.2d 923, 493 N.Y.S.2d 127 (1985) (declaring that "the law is well settled that, for the purpose of establishing reliability or credibility, identified private citizens providing law enforcement officers with information pertaining to criminal activity are to be treated differently from unnamed confidential paid informants").

1730. *Hetrick*, 80 N.Y.2d at 349, 604 N.E.2d at 734, 590 N.Y.S.2d at 185.

lined in *Illinois v. Gates*[1731] considers the informant's reliability and the basis of knowledge as only "relevant considerations in the totality of the circumstances."[1732] In other words, under *Gates,* "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."[1733]

The New York courts, instead, prefer the *Aguilar-Spinelli* two-prong test, which requires that a magistrate should be informed as to the basis of the informant's knowledge and to the circumstances that led the police officer to conclude that the informant is a reliable source of information.[1734] Thus, before a New York judge can issue a search warrant, the judge must conclude that the information contained in the warrant application "came from a presumptively reliable source" and that the informant had a "basis of knowledge" to support the statement he made to the police.[1735]

A Washington State Appellate Court decided a similar case which applied the *Aguilar-Spinelli* analysis. In *State v. Carver*[1736] the court held that an affidavit based on a tip from two children, an eight year old and a ten year old, who received their information from a six year old, was sufficient to support a warrant.[1737] Therefore, since information obtained from a child can be sufficient to establish probable cause under the stringent standard applied in New York, it is safe to say that it will also be sufficient in federal courts where the less stringent "totality of the circumstances" standard is applied.

1731. 462 U.S. 213 (1983).

1732. *Id.* at 233.

1733. *Id.*

1734. Aguilar v. Texas, 378 U.S. 108, 114 (1964).

1735. *See* People v. Cantre, 65 N.Y.2d 790, 482 N.E.2d 923, 493 N.Y.S.2d 127 (1985).

1736. 753 P.2d 569 (Wash. App. 1988).

1737. *Id.* at 571. *See also* State v. Adamson, 665 P.2d 972, 979, *cert. denied,* 464 U.S. 865 (Ariz. 1983).