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THE INFORMER'S PRIVILEGE VERSUS THE CONSTITUTION: A DOCTRINAL DILEMMA

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"The police are tipped off that a man carrying narcotics will step off the morning train. A man meeting the precise description does alight from the train. No warrant for his arrest has been . . . obtained. Yet he is arrested by federal agents; and narcotics are found in his pocket and a syringe in the bag he carried."[1]

The incriminating evidence is promptly seized by the police. The arrestee is taken into custody and charged with the illegal possession of narcotics.[2] At a pre-trial hearing the defendant moves to suppress the evidence, claiming it was seized incident to an unlawful arrest.[3] The arrest is legal if made upon probable cause, and the existence of probable cause, in this situation, upon the tip of an *undisclosed informer.*

The defendant, relying on his right to confront and cross-examine his accuser, demands disclosure of the informant whose tip was used to establish probable cause.[4] The government, refusing to disclose either the source or contents of its information, claims it is privileged from disclosure.

This comment explores the interests of the informer, the government, and the accused in preserving or dispelling the mantle of secrecy surrounding the informer's disclosures and identity. While framed in terms of federal law, the rights referred to are protected at the state level as well.

Informers are widely used by police departments and law enforcement agencies. Their services are particularly useful, and indeed almost indispensable, in combating vice, gambling, and narcotics violations.[5] By supplying the police with information about the identity and location of offenders and offenses, or by taking part in pre-arranged transactions, the informer often enables the police

[1] Statement of facts in Draper v. United States, 358 U.S. 307, 315 (1959); quoted from the dissent of Mr. Justice Douglas.

[2] 70 Stat. 570 (1956), 21 U.S.C. §174 (Supp. V, 1958).

[3] FED. R. CRIM. P. 41(e). "A person aggrieved by an unlawful search and seizure may move...to suppress for the use as evidence anything so obtained....The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

[4] U. S. CONST. amend. IV. "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 persons or things to be seized." and: U. S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...."

[5] Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs* 60 YALE L.J. 1091–95 (1951).

to seize the offenders while they are perpetrating the crime.[6]

When an arrest is based on an informant's tip, it is likely that the defense will demand a showing of probable cause for the arrest and, in that connection, will insist on the right to confront the informer.[7] Satisfaction of these demands would usually involve disclosure of the informer's identity. The prosecution's general opposition to disclosure of its sources of information has given rise to the so-called "informer's privilege", which is in fact the government's privilege to keep the informer secret.[8]

The principal reason for the government's privilege is to keep its sources fruitful.[9] Disclosure of the informer would tend to scare off other informants and could affect the disclosed informer's access to further information. In addition to the government's reasons for maintaining secrecy, the informer himself generally prefers anonymity to insulate himself from possible retaliation and derision.[10]

On the other hand, the defendant's rights to confront and cross-examine his accusers and to be free from arrest but for probable cause, must weigh at least as heavily as the interests of the informer whose tip resulted in the arrest.[11]

The Defendant's Right to Compel Disclosure of the Informer's Identity

Arrests made on tips from undisclosed informers are usually executed without warrants. This is a result, at least in part, of state and federal constitutional provisions prohibiting the issuance of warrants without probable cause.[12] The unverified tip of an undisclosed informer is insufficient to fulfill the constitutional requirement.[13] The quantum

[6] Vollmer, The Police and Modern Society 84, 87, 110–11 (1936).

[7] U. S. Const. amends. IV, VI, *supra* note 4.

[8] Roviaro v. United States, 353 U.S. 53, 59 (1957). Some cases have held that the privilege extends to the contents of the statement as well, but these cases confuse this privilege with that protecting the informer from slander suits in civil proceeding. In Vogel V. Gruaz, 110 U.S. 311 (1884), plaintiff sued for slander based on statements made by the defendant to the state's attorney. The court held: "We are of the opinion that what was said by [the defendant] to [the state's attorney], was an absolutely privileged communication....The avenue to the grand jury should always be free....Any person...should not be deterred by the fear of having what he may say...disclosed afterwards in a *civil suit*...." At 314, 315 (emphasis added)

But the court was not content to limit itself to privileging the contents of the communication from disclosure in a civil proceeding and went on to say by way of dictum: "*But there is another view of the subject.* The matter concerns the administration of *penal* justice, and the principle of *public safety* justifies and demands the rule of exclusion of the contents of the communication....[I]t is the duty of every citizen to communicate to his government any information which he has of the commission of an offense...and...a court of justice will not compel or allow such information to be disclosed...by *any* person, without the permission of the government, the evidence being excluded *not for the protection of the witness...but upon...public policy*, because of the confidential nature of such communications." At 316 (emphasis added).

[9] Roviaro v. United States, *supra* note 8.

[10] This may be rather dramatically illustrated by the Schuster murder several years ago. A tip from one Arnold Schuster led to the arrest of "Willie" Sutton, a notorious bank robber. N. Y. Times, Feb. 21, 1952, p. 1, col. 2. Less than a month later Schuster was shot dead on a N. Y. sidewalk, apparently the victim of a revenge killing by friends of Sutton. N. Y. Times, Mar. 9, 1952, p. 1, col. 8. For further details see: Schuster v. City of New York, 5 N.Y. 2d 75, 154 N.E. 2d 534 (1958). It is there suggested that the government owes a positive duty to informers to protect them from harm. In support of this point, see also: In re Quarles, 158 U.S. 532, 535 (1895), where the Supreme Court said: "It is the right, as well as the duty of every citizen...to communicate...any information which he has of an offense...and...it is the duty of government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing."

[11] United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937).

[12] Protection comparable to that granted by the fourth amendment (set out at note 4 *supra*) is found in all state constitutions. 1 Carrington, Cooley's Constitutional Limitations 615 (8th ed. 1927). In addition, the fourth amendment itself is applicable in state prosecutions through the due process clause of the fourteenth amendment. Wolf v. Colorado, 338 U. S. 25, 27–28 (1949).

[13] United States v. Reynolds, 111 F. Supp. 589 (D.D.C. 1953). Defendant was arrested for illegal possession of narcotics. At trial he moved to suppress evidence on the ground that it was seized pursuant to a search warrant issued without probable cause. The challenged warrant was issued upon the arresting officer's affidavit that he had received information from a previously reliable source that the defendant was a known narcotics peddler and had stored a large quantity of narcotics in his house. Prior to the arrest the officer ascertained that the defendant did have a record of narcotics violations and did own the premises to be searched. The officer declined to disclose the identity of his source, asserting non-disclosure was essential to the informer's safety. The court held the warrant bad for lack of probable cause. "The peace officer...should state in his affidavit the facts which led him to [the] conclusion, and which were *known to him of his own knowledge.* If he has no first-hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commis-

of evidence necessary to support the warrant only exists, if at all, after the tip has been acted upon and thereby corroborated—but this is often the point at which the arrest is made.

No case has yet allowed an arrest to be upheld on the mere charge of an informer without knowledge of his *prior reliability* or without *subsequent verification* of his information.[14] What constitutes reliability and verification, however, may be more a matter of definition than a matter of fact. The courts seem reluctant to separate the tip from the verification thereof. Consequently, a police officer, acting upon a tip from an informer whose reliability is believed by him, may make an arrest alleging as probable cause some innocent act coinciding with the tip.[15] An arrest thus executed is held to have been made upon probable cause.[16]

These "otherwise innocent" acts may consist of walking "real fast" when leaving a train,[17] driving a heavily loaded car,[18] sliding closed packages on a wooden surface,[19] or getting into a car with two adults and a child.[20] Each of these seemingly innocent acts was in fact part of a criminal transaction disclosed by an arrest and search. It should be noted, however, that each arrest was made on the strength of an informer's tip and that the described act was the only verification of the tip.

The inability or refusal of the courts to separate the tip from the subsequent confirming events is partially explained by the often obvious guilt of the arrestee—particularly in those situations where mere possession is a criminal offense, *e.g.*, narcotics.[21] To allow an obviously guilty defendant to go free on the ground that there was no probable cause for his arrest admittedly seems to strain the meaning of fair play.

However, in many cases the success of the arrest is unquestionably used as verification of the tip or to establish the reliability of the informer. This is error. Legal doctrine is clear. An arrest without warrant is valid only in a situation requiring immediate action upon probable cause which is sufficient for a warrant to issue.[22] Verification and reliability cannot be established by mere coincidence. They must rest upon information gathered prior to the arrest.[23] A contrary position is an admission that the fruits of a successful search may validate an arrest illegal in its inception.[24]

Faced with this clash of doctrine and fact, the courts have not always interpreted the doctrine of probable cause so liberally. The position has been taken that the quality of the evidence necessary to establish probable cause must meet that standard required in a trial on the merits.[25] This eliminated the hearsay of undisclosed informers,[26] and demanded a greater degree of investigation subsequent to the tip but prior to the arrest. The strict view taken in these decisions was severely criticized as putting an undue burden on the police and certainly the criticism was not without justification.[27] On the other hand, the position was an

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sioner to give testimony as to the truth of the statements made by him to the commissioner." (emphasis added) See also: 14 A.L.R. 2d 605 (1950).

[14] United States v. Reynolds, *supra* note 13.

[15] In Draper v. United States, *supra* note 1, the officer acted on the tip of an informer he believed to be reliable, and the arrest, search, and seizure were upheld as having been made on probable cause. However, in *Draper*, the identity of the informer was disclosed and available to the defendant. *Cf.* Jones v. United States, 266 F. 2d 924 (D. C. Cir. 1959), where Circuit Judge Bazelon, in stating his reasons for allowing the movant to appeal in *forma pauperis*, interprets *Draper* in light of *Roviaro* (*supra* note 8) as standing for the proposition that, when there is no probable cause for an arrest other than the tip of an informer believed to be reliable by the police, the identity of the informer must be disclosed in order that his reliability be subjected to judicial scrutiny rather than that of a policeman.

[16] United States v. Hill, 114 F. Supp. 441, 442 (D.D.C. 1953).

[17] Draper v. United States, *supra* note 1.

[18] United States v. Nichols, 78 F. Supp. 483 (W.D. Ark. 1948).

[19] Scher v. United States, 305 U.S. 251 (1938).

[20] United States v. Walker, 246 F. 2d 519 (7th Cir. 1957).

[21] 70 Stat. 570 (1956), 21 U.S.C. §174 (Supp. V, 1958).

[22] Wrightson v. United States, 222 F. 2d 556, 559 (D. C. Cir. 1955). See also: Henry v. United States, 28 U.S.L. WEEK 4015 (U. S. Nov. 23, 1959). *Draper* does not abandon this doctrine but expands, by implication, the circumstances upon which a warrant may be obtained to include the tip of an informer whose previous reliability can be established to the satisfaction of the court. Cervantes v. United States, 263 F. 2d 800 (9th Cir. 1959). It would appear that disclosure of the informant's identity would be necessary to establish his reliability. *Jones v. United States*, *supra* note 15. Jones has been granted leave to appeal. When decided, this case may settle whether disclosure of the informer's identity is necessary to establish reliability.

[23] Wrightson v. United States, *supra* note 22.

[24] See notes 17–20 *supra*. Had the search in any of these cases proved fruitless, there can be little doubt that a civil action for false arrest could not have been successfully defended on the ground of probable cause for the arrest. The conclusion is inescapable that but for the success of the search there would be no probable cause. The arrests, therefore, must have been illegal in the inception.

[25] Worthington v. United States, 166 F. 2d 557, 564 (6th Cir. 1948).

[26] *Ibid.*

[27] Brinegar v. United States, 338 U.S. 160, 174–5 (1949). Criticizing generally the basis of the *Worthington* decision (*supra* note 25) the court said in a footnote

understandable reaction to those courts that accepted the slimmest reeds of verification offered in the support of probable cause.

Of course not all cases involving undisclosed informers contain so many traps for an unwary court. Where the tip of the informer is used solely as a jumping-off point for investigation leading to an independent determination of probable cause, there is probably no way in which the defendant can compel disclosure of the informer. In these cases probable cause depends upon facts known to the police through their senses and not upon the informer's tip.[28] The fact that the investigation was instigated by the tip of an informer would be immaterial and irrelevant, as well as against government policy.[29] There need be no probable cause for surveillance.[30]

Another class of cases is that in which the informer participates in the crime.[31] Because of his participation, the informer can be considered a material witness, and failure to disclose his identity would be a denial of due process.[32] The penalty for nondisclosure is usually dismissal of the case,[33] and, in at least one instance, failure of the officer to disclose the informer's identity when so ordered by the court resulted in his being cited for contempt.[34]

Conclusion

Generally the accused may compel disclosure of the informer's identity by making the informer material to his defense.[35] Materiality may be established by a timely motion to suppress evidence as having been illegally seized[36] or by attacking the reliability of the informer[37] or the good faith of

"The inappropriateness of applying the rules of evidence as a criterion to determine probable cause is apparent in the case of an application for a warrant before a magistrate, the context in which the issue of probable cause most frequently arises. The ordinary rules of evidence are generally not applied in *ex parte* proceedings. . . 'partly because the judge's determination is usually discretionary, partly because it is seldom final, but mainly because the system of Evidence rules was devised for the special control of trials by jury' . . . . (D)ictum that '(a) search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury. . . '[was a] proposition [for which] there was no authority in the decisions of this Court." The court did, however, recognize that the criticized dictum has been the basis for decision in cases before the Courts of Appeals and District Courts. These decisions were not overruled, but obviously failed to impress the Supreme Court.

[28] Mc Quaid v. United States, 198 F. 2d 987 (D.C. Cir. 1952). Police officers, acting on a tip that appellant was in possession of stolen goods, went to appellant's second-hand store where they observed goods fitting the description of those stolen. Upon inquiry, appellant at first denied but later admitted having more goods fitting the description of those stolen. Appellant also told the officers that records required to be kept by appellant's type of business were unavailable. In refusing to require disclosure of the identity of the informer whose tip led to the discovery of the stolen merchandise, the court stated: "The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. Justification is not sought because of honest belief based upon credible information. . . "

[29] Scher v. United States, *supra* note 19 at 254. Officers arrested appellant after receiving a tip that he would be transporting bootleg whiskey and after observing and hearing appellant loading heavy packages into his car. The court held that the arrest was made upon probable cause gathered by independent observation, but felt obliged to bolster this holding with the statement: "Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith."

[30] Donnelly, *supra* note 5 at 1096.

[31] A frequently employed defense in participation cases is entrapment. When entrapment is alleged, confrontation will almost certainly be granted. Even when not alleged by defense counsel, the court has been known to suggest the possibility of entrapment and remand with orders to disclose the identity of the informant so as to determine the rights of the defendant, *e.g.*, Roviaro v. United States, *supra* note 8 at 64. "His [the informer's] testimony *might have* disclosed an entrapment." (emphasis added) Entrapment was not a defense asserted by appellant. (dissent of Mr. Justice Clark, *id.* at 69.)

[32] Sorrentino v. United States, 163 F. 2d 627, 628–629 (9th Cir. 1947). "If the person. . . called an informer had been an informer and nothing more, appellant would not have been entitled to have his identity disclosed; but the person. . . called an informer was something more. He was the person to whom appellant was said to have sold and dispensed the opium described in the indictment. Information as to this person's identity was therefore material to appellant's defense, and appellant was entitled to a disclosure thereof."

[33] Roviaro v. United States, *supra* note 8 at 60–61. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action."

[34] Wilson v. United States, 59 F.2d 390 (3d Cir. 1932). But see: United States v. Keown, *supra* note 11, where the court, recognizing the contempt to be that of the agent-witness's superiors, simply dismissed the case.

[35] 8 Wigmore, Evidence §2374(4) (3d ed. 1940). "Even where the privilege is strictly applicable, the *trial court may compel disclosure*, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony." Compare: United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945).

[36] Fed. R. Crim. P. 41(e), *supra* note 3.

[37] United States v. Keown, *supra* note 11 at 645. "If the information of the informer was unreliable or he was unworthy of belief, the officer did not have probable cause to make either the search or the arrest."

the officer testifying thereto.[38] These elements may well be the Achilles heel of the prosecution and should be challenged at every level, from the preliminary hearing to the last appeal.

The principle of materiality has been recognized in some of the more recent decisions.[39] Rather than adhere to one rule or another, the courts have, in these, attempted to take the cases as they come, balancing the defendant's rights in each against the government's interest in concealing the informant's identity. This has resulted in the anomalous position that the strength of the law is, in this area, reposed in indecision, for the courts which follow this middle-of-the-road approach must haunt the over-zealous police officer with the spectre of having to produce the informer or watch his case dissolve for want of a probable cause.

Despite the anomaly, this appears to be the best solution offered thus far. It must be recognized, however, that any holding allowing the informer's accusations to go unchallenged is an abdication of judicial responsibility and must, to some degree, leave the final determination of probable cause to the mind of the arresting officer in what amounts to an *ex parte* proceeding devoid of the safeguards provided in a judicial hearing. At the same time, such a holding invites and allows circumvention of both the fourth amendment mandate as to probable cause and the sixth amendment guarantee to the right of confrontation of witnesses.[40]

[38] United States v. Nichols, *supra* note 18 at 487.

[39] Roviaro v. United States, *supra* note 8 at 62. "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

[40] The defendant is afforded the protection of the sixth amendment implicitly through the due process clause of the fourteenth amendment subject to the limitation that the defendant's right to be present bears a reasonably substantial relation to his defense. Snyder v. Massachusetts, 291 U.S. 97 (1934). This would undoubtedly protect the right to confront and cross-examine witnesses against the defendant. In any case, this protection is also granted by all state constitutions. 1 CARRINGTON, *op. cit. supra* note 12 at 666.