RECENT DEVELOPMENTS

CONSTITUTIONAL LAW: EVEN WHEN ARREST IS MADE WITHOUT A WARRANT, OFFICERS NOT REQUIRED TO DISCLOSE SOURCE OF INFORMATION USED TO ESTABLISH PROBABLE CAUSE

IN *McCray v. Illinois*[1] the Supreme Court held that the Constitution does not require disclosure of a reliable informer's identity when police rely on information supplied by such a person to establish probable cause for an arrest and incidental search without a warrant. McCray had been arrested and indicted on a charge of possession of narcotics. At a pretrial hearing on a motion to suppress the narcotics as evidence, the arresting officers testified that an informer had told them that McCray was selling narcotics and had later pointed out the suspect at an intersection. Since, according to the police, the same informer had previously given accurate information which had resulted in numerous arrests and convictions, the officers felt that probable cause existed to make the arrest without an arrest warrant. The state court denied McCray's request for disclosure of the informer's name and address as well as his motion to suppress the evidence. McCray appealed his subsequent conviction for possession of narcotics, claiming that the trial court's refusal to require disclosure of the informer's identity constituted a denial of both due process and the sixth amendment right to confront witnesses. The Supreme Court, however, upheld the conviction in a 5-4 decision.

Probable cause, both to obtain an arrest warrant and to justify arrests without warrants, can properly be predicated on hearsay information given by an informer whose past tips have proven accurate and reliable[2] "so long as a substantial basis for crediting the hearsay is presented."[3] To establish the informer's reliability at least some "basis in experience in the reliability of the informer must be shown."[4] Thus, the police cannot merely allege that the informer

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[1] 386 U.S. 300 (1967).

[2] See, *e.g.*, United States v. Ventresca, 380 U.S. 102, 108 (1965) (warrant); Draper v. United States, 358 U.S. 307, 312-13 (1959) (no warrant).

[3] Jones v. United States, 362 U.S. 257, 269 (1960).

[4] Wong Sun v. United States, 371 U.S. 471, 480 (1963); *accord*, United States v.

is reliable[5] but must provide some indicia which support both the informer's opinion concerning the truth of his information and the officer's belief in the informer's reliability.[6] Such credence is strengthened when the informer's tip has been corroborated.[7] Indeed, even innocent corroboration such as the suspect's appearance as predicted by the informer may properly support a finding of probable cause since it indicates the correctness of the information.[8] Presumably, the same standard for establishing reliability is applied to both the request for an arrest warrant and the justification of an arrest without a warrant. Although arrests with warrants are preferred over arrests without warrants[9] and in some situations warrants are required,[10] a substantive distinction between probable cause for a warrant and probable cause for an arrest without a warrant has not been made.[11] Dictum in *United States v. Ventresca*[12] does indicate that in doubtful cases a warrant issued by an independent magistrate might be sustained when an arrest without a warrant would be illegal.[13] However, a certain minimum standard is applicable to both the warrant and no-warrant situations. Thus, if a reliable informer's story, corroborated by the acts of the suspect, justifies an arrest without a warrant,[14] similar evidence of reliability and corroboration will justify the issuance of a warrant.[15] Conversely, if the police cannot properly obtain a warrant without presenting evidence of reliability,[16] under similar circumstances they will not be able to make an arrest without a warrant.[17]

Whether in the context of a challenge to probable cause for a

Elgisser, 334 F.2d 103, 110 (2d Cir.), *cert. denied*, 379 U.S. 881 (1964); see, *e.g.*, Espinoza v. United States, 278 F.2d 802, 804 (5th Cir.), *cert. denied*, 364 U.S. 827 (1960) (a previously reliable informer).

[5] See, *e.g.*, Aguilar v. Texas, 378 U.S. 108 (1964).

[6] *Id.* at 114; see United States v. Ventresca, 380 U.S. 102, 109 (1965).

[7] See, *e.g.*, Jones v. United States, 362 U.S. 257, 269-70 (1960); Buford v. United States, 308 F.2d 804 (5th Cir. 1962).

[8] Draper v. United States, 358 U.S. 307 (1959) (informer reliable; corroboration by innocent acts); United States *ex rel.* Coffey v. Fay, 344 F.2d 625 (2d Cir. 1965) (new informer; innocent corroboration).

[9] Aguilar v. Texas, 378 U.S. 108, 110-11 (1964).

[10] See United States v. Ventresca, 380 U.S. 102, 107 n.2 (1965).

[11] See Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[12] 380 U.S. 102 (1965).

[13] *Id.* at 105-06 (dictum).

[14] Draper v. United States, 358 U.S. 307, 313 (1959).

[15] Jones v. United States, 362 U.S. 257, 269-70 (1960).

[16] Aguilar v. Texas, 378 U.S. 108, 113-14 (1964).

[17] Beck v. Ohio, 379 U.S. 89, 96 (1964).

warrant or for an arrest without a warrant, the informer's identity has generally been privileged from discovery in order to preserve his effectiveness as an aid to law enforcement.[18] However, if his identity is necessary to a fair determination of guilt or innocence, as when the informer is a material witness or a participant in the crime, the privilege will not prevent disclosure.[19] On the other hand, when the informer's identity is sought merely to attack a finding of probable cause rather than to substantiate innocence, most jurisdictions support the privilege when the informer is shown to be reliable[20] or the informant's information has been corroborated[21] but will nevertheless allow disclosure in the discretion of the trial court.[22] In support of the privilege it is usually maintained that the informer himself would be a poor witness to the reasonableness of the arresting officer's belief in his reliability[23] and that the corroboration would establish probable cause regardless of the identity of the informer.[24] However, some courts argue that the informer's identity is essential

[18] See generally 8 WIGMORE, EVIDENCE § 2374 (McNaughton rev. ed. 1961).

[19] See, *e.g.*, Roviaro v. United States, 353 U.S. 53, 60-61 (1957); Sorrentino v. United States, 163 F.2d 627, 629 (9th Cir. 1947); People v. Diaz, 174 Cal. App. 2d 799, 345 P.2d 370 (1959); *cf.* Rugendorf v. United States, 376 U.S. 528 (1964) (privilege sustained; informer reliable, corroborated, and not participant); Miller v. United States, 273 F.2d 279 (5th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960) (same; identity therefore not relevant or helpful to defense); Anderson v. United States, 273 F.2d 75 (D.C. Cir.), *cert. denied*, 361 U.S. 844 (1959) (same); People v. Rodriguez, 168 Cal. App. 2d 452, 336 P.2d 266, *cert. denied*, 361 U.S. 843 (1959) (same); People v. Mack, 12 Ill. 2d 151, 145 N.E.2d 609 (1957) (same).

[20] *E.g.*, Espinoza v. United States, 278 F.2d 802, 804 (5th Cir.), *cert. denied*, 364 U.S. 827 (1960); People v. Durr, 28 Ill. 2d 308, 192 N.E.2d 379 (1963), *cert. denied*, 376 U.S. 973 (1964); Simmons v. State, 178 Tenn. 587, 281 S.W.2d 487 (1955); *cf.* Costello v. United States, 298 F.2d 99, 102 (9th Cir. 1962) (remanded to show reliability; if it cannot be shown, must disclose); United States v. Keown, 19 F. Supp. 639, 645-46 (W.D. Ky. 1937) (disclosure required since informer not shown to be reliable).

[21] *E.g.*, Scher v. United States, 305 U.S. 251 (1938); United States v. Elgisser, 334 F.2d 103 (2d Cir.), *cert. denied*, 379 U.S. 881 (1964); Newcomb v. United States, 327 F.2d 649 (9th Cir.), *cert. denied*, 377 U.S. 944 (1964); Buford v. United States, 308 F.2d 804 (5th Cir. 1962); Ferrara v. State, 101 So. 2d 797 (Fla. 1958); Harris v. State, 216 Miss. 895, 63 So. 2d 396 (1953); Arredondo v. State, 168 Tex. Crim. 110, 324 S.W.2d 217 (1959).

[22] *E.g.*, Drouin v. State, 222 Md. 271, 160 A.2d 85 (1960); State v. Edwards, 317 S.W.2d 441, 446-47 (Mo. 1958) (rejecting former Missouri rule of absolute privilege); State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964). *But see* Hudson v. State, 156 Tex. Crim. 612, 243 S.W.2d 841 (1951) (privilege apparently absolute when issue not raised as to guilt or innocence).

[23] See, *e.g.*, Jones v. United States, 326 F.2d 124, 129 (9th Cir. 1963), *cert. denied*, 377 U.S. 956 (1964); United States v. One 1957 Ford, 265 F.2d 21, 26 (10th Cir. 1959).

[24] See United States v. Elgisser, 334 F.2d 103, 110-11 (2d Cir.), *cert. denied*, 379 U.S. 881 (1964).

to test the finding of probable cause,[25] especially if there is no independent corroboration.[26] Ultimately, whether a court demands disclosure may depend on the manner in which it balances the policy conflict between the need for a free flow of information as an aid to effective law enforcement and the desire to protect the accused from possible police fabrication of an informer to justify a legally premature arrest.[27] In the view of a few courts the latter policy is sufficiently protected by the warrant procedure. Accordingly, they would require disclosure in no-warrant situations,[28] but would acknowledge the privilege when a warrant has been issued by an independent magistrate.[29] While dictum in *Roviaro v. United States*[30] gives dubious support to this distinction,[31] the Supreme Court, in defining the scope of the privilege in federal criminal cases, has actually considered only the situation where a warrant has been issued, holding in that context that disclosure is not required if the informer has been shown to be reliable.[32] Significantly, most state courts do not distingnish between the warrant and no-warrant situations, preferring instead to trust the judge's discretion.[33]

McCray rejects any distinction which allows the privilege against disclosure only when a warrant has been issued.[34] Although the petitioner acknowledged that informers can be used to establish probable cause,[35] he argned that due process and the right to confront witnesses require disclosure of the informer's identity. The court, however, reasoned that sufficient constitutional protection was afforded by the Illinois procedure, especially since the issue was not

[25] Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958).

[26] People v. Robinson, 166 Cal. App. 2d 416, 333 P.2d 120 (1958).

[27] *Compare* People v. Durr, 28 Ill. 2d 308, 192 N.E.2d 379 (1963), *cert. denied*, 376 U.S. 973 (1964) (disclosure not required) *with* Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958) (disclosure required).

[28] Priestly v. Superior Court, *supra* note 27.

[29] People v. Keener, 55 Cal. 2d 714, 361 P.2d 587 (1961).

[30] 353 U.S. 53, 61 (1957) (dictum).

[31] See McCray v. Illinois, 386 U.S. 300, 311 n.11 (1967); Scher v. United States, 305 U.S. 251 (1938) (no warrant; disclosure not required; corroboration made disclosure irrelevant to probable cause).

[32] United States v. Ventresca, 380 U.S. 102, 108 (1965); Rugendorf v. United States, 376 U.S. 528, 533 (1964). Compare Roviaro v. United States, 353 U.S. 53 (1957) (disclosure required because informer had participated in crime with accused). See also Aguilar v. Texas, 378 U.S. 108, 114 (1964).

[33] See, *e.g.*, State v. Edwards, 317 S.W.2d 441 (Mo. 1958); State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964); Simmons v. State, 198 Tenn. 587, 281 S.W.2d 487 (1955).

[34] 386 U.S. at 311 n.11.

[35] *Id.* at 305.

the guilt or innocence of the accused. Under the Illinois scheme, which is followed in many other states by statute[36] or by judicial decision,[37] the police may retain in confidence the name of the informer if the judge is convinced that the information upon which the police relied had been given by a reliable informer. This flexible rule allows the police the use of unnamed informers and assures the accused that the police cannot manufacture an informer to supply otherwise insufficient probable cause. Since the Supreme Court had adopted a flexible rule to be followed when a federal warrant is sought[38] and had provided no absolute principle of disclosure even when the issue raised at trial pertains to the accused's guilt or innocence,[39] the majority concluded that an inflexible rule would not be required simply because the issue of probable cause was raised in a no-warrant situation.

The dissenters believed that the privilege of nondisclosure would encourage improper law enforcement by facilitating arrests without warrants and further would in effect make the police the arbiters of probable cause.[40] Therefore, these Justices would require disclosure of the informer's identity in the no-warrant situation because "without that disclosure . . . [the court] can [n]ever know whether there was 'probable cause' for the arrest."[41] However, this reasoning would seem to apply equally when a warrant is sought and thus could entirely prevent the use of unnamed informers to establish probable cause. It is possible that denial of the use of unnamed informers would encourage more professional law enforcement techniques because the police would have to investigate all leads until, by their own independent observations, probable cause had been established.[42] However, adoption of such a rule would unduly tax an overburdened police force, inhibit the willingness of informers to offer information, and totally handicap the police when independent investigation would otherwise be impractical or impossible.[43] Moreover, the fears expressed in the dissenting opinion do not seem well-

[36] *E.g.*, CAL. EVID. CODE § 1042 (c).
[37] *E.g.*, State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964).
[38] See United States v. Ventresca, 380 U.S. 102, 108 (1965).
[39] See Roviaro v. United States, 353 U.S. 53, 62 (1957) (dictum).
[40] 386 U.S. at 315 (dissenting opinion).
[41] *Ibid.*
[42] See, *e.g.*, United States v. Keown, 19 F. Supp. 639, 645-46 (W.D. Ky. 1937); Priestly v. Superior Court, 50 Cal. 2d 812, 818, 330 P.2d 39, 43 (1958).
[43] *E.g.*, State v. Burnett, 42 N.J. 377, 385, 201 A.2d 39, 43-44 (1964). Compare

founded, for just as the magistrate serves to check the police when they request a warrant, judicial review of probable cause in no-warrant situations stands as a guard against overzealous arresting officers.[44] Thus, the majority soundly chose to follow a flexible approach which permits the free flow of information and eases the investigatory burden of the police but which at the same time allows disclosure when it is essential to the defense or when the police have not demonstrated that they relied in good faith on credible information supplied by a reliable informer.

Wrightson v. United States, 236 F.2d 672, 673 (D.C. Cir. 1956) (suspect about to leave town; no time for warrant).

[44] See Beck v. Ohio, 379 U.S. 89 (1964).