IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

TERRY WAYNE JENNINGS,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	No. F-2001-1028
-vs-	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, J.:

Terry Wayne Jennings, Appellant, was tried by jury in the District Court of Kiowa County, Case No. CF-99-18, and convicted of Trafficking in Illegal Drugs.[1] In accordance with the jury's recommendation, District Judge David A. Barnett sentenced Appellant to eighteen years imprisonment. Though not recommended by the jury, the trial court also imposed the mandatory statutory minimum fine for trafficking of $25,000.00. From this judgment and sentence, he appeals.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse for the reasons discussed below. The following propositions of error were raised for review:

I. The State's Rule Six appeal was erroneously sustained: the affidavit for search warrant was insufficient as a matter of law and therefore evidence was seized in violation of the Fourth Amendment and Article 2, § 20 of the Oklahoma Constitution;

[1] Appellant was acquitted of Count II – Manufacturing a Controlled Dangerous Substance.

II. The Appellant presented a sufficient preliminary showing to have been allowed a *Franks v. Delaware* hearing and the court's denial of that hearing constitutes error; and

III. The State introduced other crimes evidence that was prejudicial to the Appellant and denied him the fair and dispassionate deliberation of the jury.

We find merit in Proposition I. In *Langham v. State*, 1990 OK CR 9, 787 P.2d 1279, 1281, this Court abandoned the *Aguilar-Spinelli* test for determining whether an informant's tip established probable cause to believe contraband or evidence is located in a particular place.[2] In its place, we adopted the "totality of the circumstances" test enunciated in *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527. Following *Gates*, we stated the task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. In other words, for probable cause to exist, the issuing magistrate must have some basis for determining there is a fair probability the circumstances and/or information contained in the affidavit is true. In evaluating the validity of a search warrant on appeal, we review the affidavit to ensure that the magistrate issuing the warrant had a substantial basis for determining that

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[2]The two-pronged test derived from the United States Supreme Court's decisions in *Aguilar v. Texas*, 378 U.S.108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723(1964) and *Spinelli v. United States*, 393 U.S. 410, 416, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) was whether the affidavit in support of a request for a search warrant contained underlying circumstances indicating the informant was credible, or that the informant's information was reliable.

probable cause existed.[3]

The parties throughout the case agreed that an affidavit for search warrant based on specified factual information given by a named and known informant need not set forth details to show that the information was credible. It is only where the tip is provided by an undisclosed informant that the affidavit must contain facts to show there is a fair probability the circumstances and/or information contained in the affidavit is true, i.e., the informant is credible and/or the information reliable under the totality of the circumstances. *See Sockey v. State,* 676 P.2d 269, 271 (Okl.Cr.1974). Although there was some identifying information disclosed about the source of the tip in this case, namely the person was a juvenile female presumably with the initials "C.G.," she was not named and known. The whole practice of using a juvenile's initials is to protect their identity. Furthermore, the affiant, Bob Carder, testified he did not know C.G. prior to the evening of February 26, 1999. Given that the source/informant was not named and known, we reviewed the surrounding circumstances to determine if the affidavit provided a basis for believing the information C.G. provided was true. Generally, courts have accepted four methods of establishing the reliability of an informant: (1) The

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[3] In *Langham*, this Court upheld the magistrate's finding of probable cause. In so holding, we found the magistrate had a sufficient basis for determining a fair probability the *circumstances and/or information* supplied by the confidential informant in the affidavit was true. Initially, a controlled buy had already been made from the location to be searched. Secondly, the affidavit contained the length of time the detective had known the informant and the past performance and reliability of that informant. Thus, the magistrate had two independent basis for concluding there was a fair probability the information supplied by the informant was true.

informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *See State v. Valdez,* 562 N.W.2d 64, 72-73 (Neb.App.1997). Here, the affidavit contains no information that C.G. had given reliable information in the past or that Carder or any other officer conducted any independent investigation that established C.G.'s reliability or the reliability of C.G.'s information.

This case is strikingly similar to *State v. Emerson,* Case No.SR-99-908 (unpublished 2000), in which this Court affirmed a district court's ruling sustaining a motion to suppress where there was no evidence in the affidavit that independent corroboration of any part of the informant's information had been made by law enforcement personnel prior to requesting the search warrant and the affidavit failed to contain any information regarding the veracity or reliability of the confidential informant. We found there was no basis for the issuing magistrate to have found there was a fair probability the ***circumstances and/or information*** contained in the affidavit was true. *Id.* In ruling, the *Emerson* court refused to find that the informant's reliability was established by the detail of her statement or by the fact she made statements against her penal interest in admitting participation in a crime. The information contained in the affidavit in this case was far less detailed than in the *Emerson* case and we do

not find the so-called statement C.G. made against her penal interest sufficient in this case.[4] Though not binding, we find *Emerson* persuasive authority. Based on the affidavit presented, there was no basis for the issuing magistrate to have found there was a fair probability the ***circumstances and/or information*** contained in the affidavit was true. Accordingly, we find the district court erred in its Rule 6 ruling and reverse Appellant's conviction with instructions to dismiss.

DECISION

The Judgment and Sentence of the trial court is **REVERSED with INSTRUCTIONS TO DISMISS.**

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[4] In *Emerson*, the informant detailed her role in manufacturing methamphetamine. In this case, C.G. said she hid a large quantity of methamphetamine under Appellant's dryer. One could infer she was attempting to steal it or equally plausible trying to foil Appellant. The affidavit does not include facts concerning C.G.'s intent. The State maintained below that CG was guilty of possession.

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OPINION BY: STRUBHAR, J.
LUMPKIN, P.J.: DISSENT
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: DISSENT

LILE, JUDGE: DISSENTS

In *Bollinger v. State*, 1976 OK CR 269, 556 P.2d 1035, we said:

> "The initial imposition of rules calling for officers to establish credibility of their informants was predicated on the evils of a system which allowed the hearsay of an unknown or perhaps even non-existent person to be the source of information for establishing probable cause to enter and search an otherwise constitutionally protected area. But, in the instant case the victim is not confidential but rather known to all parties and once more, her allegations are open to scrutiny by the judicial process. The charges made by a confidential informant may quite probably send the defendant into the judicial process without ever again requiring an appearance of the informant. However, the victim must be continually subjected to the openness of a trial. The knowledge of a victim that he will be subjected to the ensuing proceedings; that he is known to all parties; and that his assertions will be meticulously examined, assures a degree of credibility which far surpasses that which is offered by sworn facts which the defendant now contends should have been offered in the officer's affidavit. This same proposition was briefly dealt with in *Vessels v. Estelle*, D.C., 376 F.Supp.1303 (1973), wherein the Court held:
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> > 'The victim of a crime must be considered to be a credible source of information about that crime.'
> >
> > We agree. To hold as the defendant now suggests would broaden the application of this principle into an area much greater than common sense suggests."

In this case, C.G. was, in fact, disclosed and a victim. In testing the warrant, defense counsel obtained an affidavit from C.G. and had her available to testify. C.G. was not an undisclosed confidential informant, but rather the victim of a crime.

This affidavit satisfies the requirements of *Langham v. State*, 1990 OK CR 9, 787 P.2d 1279; and *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

I am authorized to state that Judge Lumpkin joins in this Dissent.